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FAIRNESS IN BROADCASTING ACT OF 1987

HEARING

BEFORE THE

SUBCOMMITTEE ON COMMUNICATIONS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

FIRST SESSION

ON

S. 742

TO CLARIFY THE CONGRESSIONAL INTENT CONCERNING, AND TO CODIFY, CERTAIN REQUIREMENTS OF THE COMMUNICATIONS ACT OF 1934 THAT ENSURE THAT BROADCASTERS AFFORD REASONABLE OPPORTUNITY FOR THE DISCUSSION OF CONFLICTING VIEWS ON ISSUES OF PUBLIC IMPORTANCE

MARCH 18, 1987

Printed for the use of the Committee on Commerce, Science, and Transportation

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FAIRNESS IN BROADCASTING ACT OF 1987

WEDNESDAY, MARCH 18, 1987

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 2 p.m. in room SR-253, Russell Senate Office Building, Hon. Daniel K. Inouye [chairman of the subcommittee] presiding.

Staff members assigned to this hearing: Tom Cohen, staff counsel and Katherine Meier, minority staff counsel.

OPENING STATEMENT BY SENATOR INOUYE

Senator INOUYE. The hearing will please come to order. Today's hearing is on S. 742, the Fairness in Broadcasting Act, a bill to make the Fairness Doctrine an explicit statutory requirement.

This bill was introduced last week by Senators Hollings, Danforth and myself, and we believe it is necessary because of two developments: First, the court ruling by Judge Bork on the *TRAC* case, which found that Congress had ratified the Fairness Doctrine but never codified it; and second, the actions by the FCC to abolish the doctrine.

The Fairness Doctrine provides that broadcasters air important issues of the day and that they provide opportunities for discussion of conflicting points of view. It carefully preserves the First Amendment rights of both broadcasters and the public.

Forty years of experience with the Fairness Doctrine have clearly shown its great value. It is for that reason we are moving forward today to ensure its continuation.

This hearing will consist of one panel, four on each side of the Fairness Doctrine debate. Each witness will get two and a half minutes to make opening remarks. We will then turn to questions from members of the subcommittee. I believe this will permit an extended debate on issues surrounding the Fairness Doctrine.

I wish to thank all of the witnesses who are present with us for taking the time to be here. And I look forward to this testimony and discussion.

Do you have any remarks you would like to make, sir?

OPENING STATEMENT BY SENATOR PACKWOOD

Senator PACKWOOD. Mr. Chairman, I do. Mr. Chairman, this committee once again has before it the question of how the First Amendment and Freedom of Expression extend to the electronic

media or, more accurately, how they may not extend to the electronic media.

This is not the first time that this Committee has looked into this area. As Chairman of this committee, I held six hearings on Freedom of Expression as it relates to the electronic media. Three were in 1982, three were in 1984, and at those hearings we heard from more than 50 witnesses on both sides of the issue.

We heard from specialists in communications technology, we heard from constitutional scholars, we heard from broadcasters, as well as representatives from the newspaper, cable, and telephone industries. And we heard from any number of witnesses who believed in the Fairness Doctrine and wanted it codified and defended it. Those hearings were very comprehensive.

Mr. Chairman, I do not think the issues before us today are much different than those we studied in 1982 and 1984, other than two or three new court cases that have occurred since that time.

The drafters of our Constitution wrote into the Bill of Rights the strongest possible protections for all forms of expression known to them, speech and press. Unfortunately, these guarantees have not kept pace with the growth of new methods of communication. Technological advances have many of our communications regulatory policies obsolete. Nowhere is this more true than with the statues, regulations, and court decisions that restrict the first amendment rights of the electronic media.

Regulation of the electronic media began in the 1920's with the rise of commercial radio broadcasting. The Government claimed that it owned the airwaves or, if it did not own them outright, it was the public's fiduciary and it had the right to allocate the use of these airwaves.

In the early days of radio regulation, the number of frequencies that could be allocated to radio stations was presumed to be limited. Therefore, those who received licenses were obligated to act in the "public interest," as that term was defined by the Government. Later, the same rules were applied to television. From that obligation to act in the "public interest" has come a host of rules and regulations which permit the Government to affect the decisions of the electronic publisher.

New communications methods have increased the number of people who can use the spectrum, but restrictions based upon scarcity have not been removed. In September, 1982, this committee heard the testimony of four expert witnesses on the communications technologies of the present and the future. Each of these witnesses questioned the continued validity of the scarcity principle by pointing to technological advances which have allowed us to greatly expand our use of the spectrum. In addition to this expanded spectrum, we have seen the advent of cable TV, and other developing satellite and electronic information services. The notion that the Government must regulate electronically transmitted information because of spectrum scarcity simply ignores today's reality.

Another point that was brought out very clearly in the 1984 hearings is that content regulation chills the free exchange of ideas. Small, local broadcasters referred to the fairness doctrine as the "fearness doctrine" because of the ease with which it is used to

harass and intimidate them to back away from the coverage of controversial issues.

The FCC, in its 1985 Fairness Report, pointed to this chilling effect as one of the reasons the Fairness Doctrine no longer serves the public interest. The Commission's report concluded that instead of furthering the discussion of public issues, the Fairness Doctrine inhibits broadcasters from presenting controversial issues of public importance.

Mr. Chairman, I agree with the FCC's conclusion that the Fairness Doctrine does not serve the public interest. I believe that the liberties and privileges now enjoyed by the print press—the protections of the first amendment—should be extended to all methods of communications in this country. For this reason, I think Senator Hollings' bill, which codifies the Fairness Doctrine, moves in the wrong direction. Instead, it is time to remove the shackles of content regulation from broadcasters and return to the vision of our Founding Fathers. To this end, later this week, I will be reintroducing legislation, which I have introduced in the past two Congresses, to repeal the content doctrines imposed on the electronic media.

Mr. Chairman, the first amendment says that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." our Founding Fathers adopted this amendment at a time when there were only eight daily newspapers in this country. And those eight publications were partisan, slashing, passionate publications. They attacked incumbent politicians, but the incumbent politicians of that day still said that liberty is so precious and so dear to the preservation of free Government as they hoped to establish it, that they would protect the source of communication against any Government regulation.

I believe these principles should be applied to all forms of communication, be they electronic, print, or whatever else the future may bring.

Thank you, Mr. Chairman.

Senator INOUYE. Senator Hollings.

OPENING STATEMENT BY THE CHAIRMAN

The CHAIRMAN. I thank you, Mr. Chairman and Senator Packwood.

I think it is well that the committee codify in law the policy on the Fairness Doctrine which has been the government policy for lo these many years. Yes, Chairman Packwood, you did hold hearings and we adhered to the Fairness Doctrine. But Mark Fowler wants to leave us a going away present, and I am not going to accept it if I possibly can.

I think this doctrine has brought about, in its requirement for balance, a credibility within the broadcast media and the print media as well that has not infringed on anybody's right.

It is a limited spectrum out there. We will get the facts about the spectrum in the broadcast marketplace from these witnesses, and I think it is well we do.

I appreciate your leadership, Chairman Inouye, on this particular score. And I apologize, I cannot stay with all the witnesses because I am on the horns of the typical dilemma around this town. I

have over in the Budget Committee Gramm-Rudman-Hollings, having to defend that, and I think I have less allies over there than what I have over here on fairness.

I want to thank the Chairman of the Subcommittee, Senator Inouye, for moving promptly on the legislation we introduced last week to codify the Fairness Doctrine. When you mix an improper court decision with the misguided views of the Commissioners at the FCC, you have a recipe for disaster. That is where we are today. If either the court or the FCC had gotten it right, there would be no need for us to proceed with this legislation. Instead, they both got it wrong, and so it is time for Congress to step in and bring some sense to this matter.

I doubt if anybody in this hearing room today has not chosen sides on this issue. The debate over the Fairness Doctrine has been going on ever since it became part of the FCC rules. We all know the Chairman of the FCC, Mr. Fowler, has not been shy about expressing his views on this matter. The Senator from Oregon, Mr. Packwood, has also been direct and persistent in his efforts to abolish the doctrine. Even I, have once or twice expressed a view on the Fairness Doctrine.

What we are here for today is to cut through the ideology and get to the facts about the Fairness Doctrine. We need to get to the facts about the spectrum and the broadcast marketplace. I believe that when we do so, we will clearly see why the public needs the Fairness Doctrine and why it enhances the First Amendment rights of the public and the broadcasters.

Senator INOUYE. You have a lot of allies here.

The CHAIRMAN. Thank you very much, Mr. Chairman.

Senator INOUYE. Thank you very much, sir.

[The bill follows:]

100TH CONGRESS
1ST SESSION

S. 742

To clarify the congressional intent concerning, and to codify, certain requirements of the Communications Act of 1934 that ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

IN THE SENATE OF THE UNITED STATES

MARCH 12, 1987

Mr. HOLLINGS (for himself, Mr. INOUYE, and Mr. DANFORTH) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

---

A BILL

To clarify the congressional intent concerning, and to codify, certain requirements of the Communications Act of 1934 that ensure that broadcasters afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That this Act may be cited as the "Fairness in Broadcasting Act of 1987".

SEC. 2. FINDINGS.

The Congress finds that—

(1) despite technological advances, the electromagnetic spectrum remains a scarce and valuable public resource;

(2) there are still substantially more people who want to broadcast than there are frequencies to allocate;

(3) a broadcast license confers the right to use a valuable public resource and a broadcaster is therefore required to utilize that resource as a trustee for the American people;

(4) there is a substantial governmental interest in conditioning the award or renewal of a broadcast license on the requirement that the licensee ensure the widest possible dissemination of information from diverse and antagonistic sources by presenting a reasonable opportunity for the discussion of conflicting views on issues of public importance;

(5) while new video and audio services have been proposed and introduced, many have not succeeded, and even those that are operating reach a far smaller audience than broadcast stations;

(6) even when and where new video and audio services are available, they do not provide meaningful alternatives to broadcast stations for the dissemination of news and public affairs;

(7) for more than thirty years, the Fairness Doctrine and its corollaries, as developed by the Federal Communications Commission on the basis of the provisions of the Communications Act of 1934, have enhanced free speech by securing the paramount right of the broadcast audience to robust debate on issues of public importance; and

(8) the Fairness Doctrine (A) fairly reflects the statutory obligations of broadcasters under that Act to operate in the public interest, (B) was given statutory approval by the Congress in making certain amendments to that Act in 1959, and (C) strikes a reasonable balance among the first amendment rights of the public, broadcast licensees, and speakers other than owners of broadcast facilities.

SEC. 3. AMENDMENT TO THE COMMUNICATIONS ACT OF 1934.

(a) Section 315 of the Communications Act of 1934 (47 U.S.C. 315) is amended—

(1) by redesignating subsections (a) through (d) as subsections (b) through (e), respectively; and

(2) by inserting before subsection (b) the following new subsection:

"(a)(1) A broadcast licensee shall afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

"(2) The enforcement and application of the requirement imposed by this subsection shall be consistent with the rules and policies of the Commission in effect on January 1, 1987.".

SEC. 4. EFFECTIVE DATE.

This Act and the amendment to the Communications Act of 1934 added by this Act shall take effect upon the date of enactment.

Senator INOUYE. Our first witness is the Chairman of the Federal Communications Commission, Chairman Mark Fowler. Mr. Chairman.

STATEMENTS OF HON. MARK S. FOWLER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; CHARLES FERRIS, COUNSEL; TOM ELKINS, PRESIDENT AND GENERAL MANAGER, KNUI-AM; THOMAS L. GOODGAME, PRESIDENT, TELEVISION STATION GROUP, WESTINGHOUSE BROADCASTING COMPANY, INC.; JOHN SPAIN, NEWS DIRECTOR, WBRZ; PROF. ROBERT L. SHAYON, ANNENBERG SCHOOL OF COMMUNICATIONS, UNIVERSITY OF PENNSYLVANIA; CRAIG T. SMITH, PRESIDENT, FREEDOM OF EXPRESSION FOUNDATION; AND ROY FISHER, DEAN EMERITUS, SCHOOL OF JOURNALISM, UNIVERSITY OF MISSOURI

Mr. FOWLER. Good afternoon, Mr. Chairman and members. I am grateful for this opportunity to discuss with you the Fairness Doctrine.

At a time when Americans everywhere are celebrating the Bicentennial of the American Constitution, I think it is fitting that we focus today on that most essential of democratic rights—liberty of expression. Since the founding of our Nation, men and women have fought, suffered and died in the name of free speech.

Though they sacrificed at different times and in different ways, their common goal was to ensure the survival of these words: "Congress shall make no law . . . abridging the freedom of speech, or of the press." Today we are once again challenged to make no law—to free broadcast journalists and the electronic media from the dangerous chill of government-imposed content regulation. Government balancing of program content is and will always be indistinguishable from censorship, stifling informed debate by encouraging broadcasters not to air controversial issues of public importance. Stripped of its pleasing name and good intentions, the Fairness Doctrine can be exposed for what it really is—an enemy of free speech. And if the equal time rule for political broadcasting worked

so well, why do we have to suspend it in order to have national presidential debates?

America prides itself on a free and independent press. Yet, we tolerate a government policy that gives a handful of political appointees the power to decide what the entire Nation can and cannot watch on television every day. That is a sad and shameful irony, and the American people deserve better.

They deserve to know the findings of the FCC's Fairness Report, submitted as part of my formal testimony today. That report documents the absolute unfairness of letting Federal regulators correct and improve viewpoints with which they disagree. Above all, the American people deserve to know the truth, that editing is what editors are for, and that the Government has no business second-guessing the editorial discretion of journalists.

The original justification for weakening the First Amendment rights of the electronic press was a perceived scarcity of broadcast outlets. Yet, today in most cases there are far more broadcast outlets than, for example, newspapers.

The Court of Appeals made that clear last fall in its ruling that the FCC need not apply the Fairness Doctrine to teletext. The court noted that "All economic goods are scarce,"—newspapers and broadcast outlets alike. "It is unclear," the court concluded, "why (scarcity) alone justifies content regulation."

Our Founding Fathers refused to ratify the Constitution without a Bill of Rights that guaranteed first and foremost, that America's press would remain forever free. I believe the time has come to let broadcasters not only share in that freedom, but become co-equals in it.

Yes, newspaper reporters and publishers sometimes make mistakes, but the vast majority of them serve with distinction because fairness and equal time are essential to good journalism. We all agree that creating a "Federal Newspaper Commission" would be unconscionable. I submit the same is true, as it was in 1787, for eliminating Government control over speech and electronic press as to broadcast outlets.

I share with Senator Bob Packwood a commitment to honor the First Amendment by eliminating any infringements on the electronic press.

Thank you.

[The following information was subsequently received for the record:]

RESPONSE OF MARK S. FOWLER
CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION
TO QUESTIONS FROM SENATOR BOB PACKWOOD
ON S. 742

1. Do you believe that the fairness doctrine is needed in order to assure that the public has access to information on controversial issues of public importance?

Answer -- No. In the 1985 Fairness Report, the Commission undertook a comprehensive analysis of the number and types of outlets currently providing information to the public, including the traditional broadcast services, the new electronic sources and the print media. On the basis of a voluminous record and its experience in broadcast regulation, the Commission concluded that there had been an explosive growth in both the number and types of outlets providing information to the public since the date of the Supreme Court's decision in Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). The Commission determined that the interest of the public in viewpoint diversity is fully served by the multiplicity of voices in the marketplace today; it concluded that governmental regulation such as the fairness doctrine is not necessary to assure that the public has access to the marketplace of ideas.

2. What changes have occurred in the traditional broadcast services since the Red Lion decision?

Answer -- With respect to radio, the Commission in the 1985 Fairness Report documented that there had been a 48 percent increase in the number of radio stations overall and a 113 percent increase in FM stations since the date of the Red Lion decision. It also found that the number of radio voices available in each local market had grown. Further, with new advances in spectrum efficiency, the Commission predicted that the number of radio outlets would continue to increase.

The Commission found that over-the-air television broadcasting had also experienced substantial growth. For example, since the Red Lion decision, the number of televison stations overall grew by 44.3 percent; the number of UHF stations increased by 113 percent. Further, the Commission documented that there had been a significant increase in the number of signals available to individual viewers in both the larger and smaller markets. With the growth of UHF television, the increase in the importance of independent television and the development of new program distribution systems among group owners, the Commission also found that the structure of the medium had become more competitive. It concluded that "there is a sufficient number of over-the-air television and radio voices to insure the presentation of diverse opinion on issues of public importance." Fairness Report, 102 FCC 2d at 208.

3. What changes have occurred in cable television since the date of the Red Lion decision?

Answer -- In the 1985 Fairness Report, the Commission found that cable television had developed from a means of improving reception into a major industry providing video programming since the date of the Red Lion decision. In that Report, the Commission demonstrated that the number of persons subscribing to cable television had increased by 975 percent and that the number of cable systems had grown by 195 percent. Based upon its assessment of the marketplace, the Commission predicted that cable television would continue to expand in the future. It determined further that there had been a significant change in the nature of cable service, as the number of channels available to individual subscribers had increased dramatically.

4. What are the alternative information services that contribute to providing diverse sources of information to the public?

Answer -- In addition to cable television, the Commission in its 1985 Fairness Report found that a number of other new electronic technologies, such as low power television, multipoint distribution service, video cassette recorders and satellite master antenna systems each contributed significantly to the marketplace of ideas.

5. Does the fairness doctrine inhibit the discussion of controversial issues of public importance?

Answer -- Yes. In the 1985 Fairness Report, the Commission assessed the efficacy of the fairness doctrine in achieving its regulatory objective of promoting discussion on controversial matters of public importance. Based upon compelling evidence of record from individual broadcasters, corporations, industry groups, trade associations, and non-profit corporations, the Commission concluded that the doctrine operates as a pervasive and significant impediment to the presentation of controversial issues of public importance; the net effect of the doctrine is to "chill" speech. In that inquiry, broadcasters from network television anchors to those in the smallest radio stations recounted that the fear of governmental sanction resulting from the doctrine creates a climate of timidity and fear, which deters the coverage of controversial issue programming. The record in that inquiry contained numerous instances in which the broadcasters decided that it was "safer" to avoid broadcasting specific controversial issue programming than to incur the potentially burdensome administrative, legal, personnel and reputational costs of either complying with the doctrine or defending their editorial decisions to governmental authorities. As a consequence, the Commission found that the public has been and continues to be deprived of information on important issues such as the nuclear arms race, religious cults, inflation, pay increases of municipal employees and ballot issues.

6. Was the evidence of a "chilling effect" in the 1985 Fairness Report limited to instances in which broadcasters were inhibited from airing a specific program involving a controversial issue of public importance?

Answer -- No. The record in the 1985 Fairness Report demonstrated that self-censorship by broadcasters is not limited to individual programs. The Report recounted instances in which licensees have adopted company "policies" in order to avoid fairness doctrine burdens. For example, some stations refuse to air any editorials. Other stations have a practice not to accept political advertisements. Still other licensees will decline to air any type of public issue advertising. Each of these practices has the direct effect of diminishing the amount of controversial material that is presented to the public on broadcast stations.

7. Do you believe that the there is a "chilling effect" on broadcasters even apart from the substantial evidence compiled in the Commission's 1985 Fairness Report?

Answer -- Yes. By its very nature, a "chilling effect" is difficult to establish in quantitative terms because it is impossible to determine how much controversial issue programming was not aired due to the fear of incurring the costs and obligations associated with the fairness doctrine. Further, broadcasters are understandably loathe to admit that they are inhibited by regulatory restraints from covering controversial issues of public importance. Such a statement is, in a very real sense, an admission against interest. It may be construed as an acknowledgement that the licensee is not adhering to the highest standards of broadcast journalism and therefore may adversely affect the broadcaster's professional reputation. In addition, he or she may fear that such a statement on the record of the licensing agency could lead to regulatory difficulties. Therefore, while the 1985 Fairness Report provided substantial evidence of a "chilling effect," we have no doubt that the inhibitions recounted in that Report are actually understated.

8. Does the fact that some broadcasters have stated that the fairness doctrine does not inhibit them from covering controversial issues of public importance demonstrate that the doctrine does not "chill" speech?

Answer -- No. The fact that some broadcasters state that the doctrine has no effect on the type, frequency or duration of their controversial issue programming does not prove that the doctrine has an absence of a deterrent effect within the industry as a whole. The fact that certain broadcasters may not be inhibited in airing controversial issue programming does not mean that broadcasters as a whole are similarly uninhibited. It should be noted that in the record in the fairness proceeding, virtually all broadcasters or their trade associations commenting

on this issue described the doctrine's "chilling effect." Only one broadcaster supported the fairness doctrine as a matter of policy and asserted that it did not chill them.

9. Does the fairness doctrine intrude upon the editorial prerogatives of broadcast journalists?

Answer -- Yes. In the 1985 Fairness Report, the Commission evaluated the effect of the fairness doctrine on the editorial decision-making process. The Commission in that report pointed out that it is forced to scrutinize deeply the content of programming in order to evaluate whether a broadcaster has complied with the fairness doctrine. For example, the agency may be required to make conclusions regarding the reasonableness of the selected program formats and spokespersons; the frequency of the broadcast; the degree of audience exposure as well as the timeliness of the opportunity for contrasting views. The Commission concluded that this minute and subjective scrutiny of program content infringed deeply into the editorial decision-making process. In addition, in that Report the Commission found that the enforcement of the doctrine requires the agency to evaluate the merits of particular viewpoints. For example, the agency determines which opinions are "significant" or important enough to trigger the responsive programming obligation and which opinions do not rise to that status. Further, in operation, the Commission found that more favorable regulatory treatment is provided to orthodox and popular opinions than is accorded to less established points of view. Thus, in operation, the doctrine violates a central principle of the First Amendment that the government is to remain neutral in the marketplace of ideas.

10. Do you believe that the fairness doctrine burdens substantially the expression of opinion on controversial issues of public importance?

Answer -- Yes. In a number of respects the constraints on speech imposed by the fairness doctrine are extremely intrusive and burdensome. Because the dissemination of a particular viewpoint by a broadcaster can trigger the burdens associated with broadcasting responsive programming, the doctrine directly penalizes the speaker for expressing his or her opinion on a matter of public concern. Although the expression of opinion on public issues is at the core of First Amendment protection, the doctrine anomalously singles out this particular category of speech for governmental scrutiny. Further, the penalty imposed by the doctrine is extremely coercive in First Amendment terms. The doctrine compels a broadcast journalist to subordinate his or her own editorial judgment to that of the government. Further, fairness doctrine violations can be grounds for non-renewal of a broadcast license.

11. Do you believe that the fairness doctrine can be justified on the grounds of spectrum scarcity?

Answer -- No. Spectrum scarcity -- a comparison of the number of persons who wish to speak on broadcast frequencies with the number of available frequencies -- is an appropriate basis upon which to justify certain types of governmental regulation. For example, there is a direct corrolation between the concept of technological scarcity and the licensing system established by the Communications Act that is designed to select the persons who will speak on broadcast frequencies. It does not follow, however, that all types of governmental regulation, including those that affect the content of speech, are similarly justified. On the contrary, where the government allots the spectrum, it is all the more compelling that it not also control the content. The governmental interest which the fairness doctrine purports to vindicate is not the interest of any individual in self-expression; rather, its alleged purpose is to further the interest of the public in obtaining access to the marketplace of ideas. The fact that there may be more individuals who wish to speak than the number of available frequences, however, bears no colorable relation to the public's interest in receiving diverse sources of information. To the contrary, as long as there is a multitude of information outlets supplying diverse opinions, this interest is fulfilled. Therefore, the number and types of information outlets is a more approprite criterion in evaluating the need for the fairness doctrine than an assessment of whether there exists an unmet demand for the use of broadcast frequencies.

12. Do you believe that the fairness doctrine is needed to safeguard the public against powerful groups which attempt to influence broadcasters?

Answer -- No. The Commission does not believe that intrusive governmental regulation is necessary to "protect" broadcasters from groups which may attempt to influence their programming decisions. The First Amendment prohibits the government from regulating the content of the newspapers in order to "protect" print journalists, and there is no evidence supporting the proposition that broadcast journalists are in greater need of "protection" than journalists of other media. Moreover, the framework of broadcast regulation is predicated in large part upon a reliance on the licensee's good faith judgment to select program material. Thus, the notion that a licensee is unable to make independent programming decisions without governmental "protection" is contrary to the premise underlying broadcast regulation. Further, the paternalistic contention that broadcasters are unable to resist undue pressure without the doctrine is purely speculative. The Commission found no evidence of this in its Fairness inquiry.

12. Do you believe that the fairness doctrine is necessary to safeguard the public against biased or one-sided broadcast reporting?

Answer -- No. Although balance may be a laudatory editorial goal, there are grave dangers when the government scrutinizes the content of speech in order to guarantee "balance." A premise underlying the First Amendment is that the danger of governmental intrusion in the marketplace of ideas is greater than the risk that on occasion all viewpoints may not be expressed. Further, the paternalistic notion that members of the public must be protected against "biased" viewpoints -- however that is defined -- is at odds with the premise underlying our democratic system of government. It is the people, not a governmental bureaucracy, which is to determine what opinions on matters of public importance are acceptable. Further, it is the public that is hurt when broadcasters shy away from covering controversial issues for fear of fairness doctrine ramifications. A democracy functions best only when the public is able to receive all points of view; and our Founding Fathers relied on a completely free press to achieve that end. The Fairness Doctrine stands as an impediment to that end and thus disserves the public interest.

Senator INOUYE. Thank you very much, Mr. Chairman.

Incidentally, without objection, if you summarize your statement your full statement will be made part of the record.

Our next witness is Mr. Charles Ferris. Charles Ferris has been in this business for quite some time.

It is your show.

Mr. FERRIS. Thank you, Mr. Chairman and members of the committee.

I appreciate the fact that you have invited me here today to testify on this, one of the most critical issues I think facing the communications industry and addressing, I think, some of the fundamental questions of how this democracy is to work.

I believe very firmly that the Fairness Doctrine has worked over the years, is working today, and is needed more today than ever before. I appreciate very much the opportunity to follow my friend Chairman Fowler, who so clearly again today expressed his views. His views so obviously are sincerely felt, they are so honestly arrived at, but they are so clearly wrong.

The question today is not about First Amendment rights for the electronic media. The question today is not about scarcity. The question today is not about censorship. The question today is not about new technologies and the promise that they might offer.

The question today is what obligations are broadcasters going to assume when they receive the very valuable license to communicate to the American public at large? That really is what the issue is all about.

We hear talk about the scarcity rationale that has been articulated in court cases heretofore, that it has disappeared; that there are new technologies coming onstream, that there are fewer print media in many communities, fewer newspapers in many communities, than there are electronic broadcasters.

That is not the question. The question is how licensing came about for broadcasters back in the early 1920's, when anyone could be a broadcaster if they could put up a transmitter. It was the broadcasting community themselves that came to this Congress and pleaded with this Congress to correct the chaos and to form a licensing mechanism whereby some privileged few would be able to get the license.

Congress passed that law, and in passing that law the deal that they made was: Yes, you will get the license, but to get that license you are going to serve the public interest.

One of the first acts of the Federal Radio Commission, predecessor of the FCC, was to articulate what has become the Fairness Doctrine. The Fairness Doctrine just requires each broadcaster that receives these licenses to do what good journalists have as the guiding light of their profession, to cover issues of controversy in your community, and when you cover issues you do it in a fair and balanced way.

What is the hardship there? The questions of the fungibility, of scarcity and the rationale in comparing newspapers to broadcast properties, in comparing the promise of new technology to broadcast properties, forget the guiding principle.

The guiding principle is what obligations do broadcasters have? Communication properties are not fungible. The pamphleteer and the broadcast property are very, very different in character, and I think the court over the years has articulated that the different characteristics of communications properties deserve and justify very different First Amendment treatment.

And I think the broadcast community as a very small price has to assume the obligations of the Fairness Doctrine. And if the Fairness Doctrine is permitted to be obliterated, as has been recommended, there will be nothing left of the public interest concept, the public trust obligation of broadcasters. It will be an empty shell without an obligation.

I do not think this committee should permit it and I think it should codify clearly the Fairness Doctrine again into law.

Thank you.

[The statement follows:]

STATEMENT OF CHARLES D. FERRIS

My name is Charles D. Ferris, and I am a member of the law firm Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. I served as Chairman of the Federal Communications Commission from 1977 until 1981.

I would like to thank the Subcommittee for the opportunity to share my views on the Fairness Doctrine. Since leaving the Commission, I have represented the Democratic National Committee, the Democratic Senatorial Campaign Committee, and the Democratic Congressional Campaign Committee in various proceedings involving the Fairness Doctrine. The views I offer, however, are my own, although the position of the Democratic National Committee et al. is quite similar. My views are based on my experience as Chairman of the FCC, which brought home to me the day-to-day workings of the Fairness Doctrine and its practical implications for broadcasting. More fundamentally, my views are also grounded on my beliefs as to the role of broadcasting in our society. That, in my view, is what the debate over the Fairness Doctrine is about—whether or not we expect broadcasters to serve as trustees for the public, to serve the public interest. For all the rhetoric to the contrary, the debate over the Fairness Doctrine is not about censorship. It is not about scarcity or the number of new media technologies. Again, it's about one thing: What obligations should broadcasters have to the public? Do they have a special trust that is

conferred with the license to broadcast? If they do, then the Fairness Doctrine gives meaning to that trust and defines the public interest standard.

In this era of deregulation, it is the only remaining safety net left for the public interest standard and our society's expectations that broadcasters will serve as trustees for the public. The point was made succinctly by Group W, owner of several broadcast stations, in its recent comments to the FCC: "Implicit in the public interest standard of the Communications Act is the fundamental obligation of broadcasters to provide the public with contrasting viewpoints on controversial issues of public importance. If the statutory public interest standard does not encompass such a requirement, the standard would be virtually meaningless." [1]

This fundamental point highlights the profound flaws in the current Commission's conclusion that the Fairness Doctrine does not serve the public interest. The Commission attempted to answer this question by taking a head count on the number of voices available in the "information marketplace", and it concluded that enough voices were available that the Fairness Doctrine was no longer necessary to serve the public interest. This analysis starts from a false premise and is legally misguided. In the context of broadcasting, the "public interest" means not just that broadcasters are one part of some overall system, which altogether provides enough informational opportunities on controversial issues of public importance to serve the public interest. Rather, the public interest standard established by Congress in the context of broadcasting means that broadcasters are public trustees with unique public responsibilities.

As I have indicated, the Fairness Doctrine forms a crucial part of these part of these public trustee obligations. Then Judge Warren Burger made this point when the U.S. Court of Appeals for the District of Columbia reviewed for a second time the case of WLBT, which had used its television license in Jackson, Mississippi to broadcast exclusively racist views during the sensitive 1950s and 1960s. He stated that: "By whatever name or classification, broadcasters are temporary permittees—fiduciaries of a great public resource, and they must meet the highest standards which are embraced in the public interest concept. The Fairness Doctrine plays a very large role in assuring the public resource granted to licensees at no cost will be used in the public interest." [2]

Former Chief Justice Burger was, and is, right. Without the Fairness Doctrine, here is nothing to prevent a broadcaster from grossly abusing the public trust embodied in a broadcast license, just as WLBT abused its public trust. If the legal requirement that the Commission grant licenses in the public interest cannot prevent such a use of a broadcast facility, the public interest concept means nothing at all.

If the Fairness Doctrine is successfully abolished, the public trust will be abandoned—informing the American public in a balanced way will no longer be assured—and a precious and valuable tool of democracy could be turned against itself. There would at best be no counter weight to broadcasters' purely economic incentives to avoid controversial issues in favor of game shows and sitcoms. Television could easily become at most a variation of the Home Shopping Network, an electronic grocery store. This would be a great tragedy. As Herbert Hoover observed when broadcasting was in its infancy: "It is inconceivable that we should allow so great a possibility for [public service] to be drowned in advertising chatter."

It is ironic that those who seek to abolish the Fairness Doctrine try to use the public interest standard as the basis for its repeal since without it, there is no public interest standard.

Broadcasters realize that they need the public interest standard, even as many oppose a crucial component, the Fairness Doctrine. They need the public interest standard to justify the tremendous power they wield in our national dialogue. They realize that our Republic and Constitution are founded on the belief that those with great power must be held accountable for their actions.

Retention of the Fairness Doctrine not only serves to ensure that these expectations are met, but also is for that reason in the best interests of broadcasters. The public will not be fooled by a public interest standard that involves no substantive responsibilities. The public places a very high value on balance and fairness. A recent survey by the Public Agenda Foundation found that by a wide margin, people believed that freedom of expression means first and foremost that all views on an issue should be available, not that government should not interfere with the

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[1] Comments of Group W, In re Complaint of Syracuse Peace Council Against Television Station WTVH at 4 (filed Feb. 25, 1987).

[2] Office of Communication of United Church of Christ v. FCC, 425 F.2d 543, 548 (D.C. Cir. 1969).

press.[3] Television has generally met the public's expectations. A recent study found that the public perceives television as the most reliable and objective news media.[4] I believe that this perceived credibility results from the fact that broadcasters, as a matter of practice, provide opposing viewpoints on an issue within each program or news show dealing with an issue. This practice is, I believe, largely attributable to Fairness Doctrine obligations although obligations do not require every single program be balanced, only that a broadcaster's overall coverage expose both sides to the public. The high credibility of television is as it should be since, according to the same study, 65 percent of the public listed television as the source of most of their news, while 40 percent rely exclusively on television for news.[5]

Broadcasters are not, however, in an invulnerable position. There is always suspicion that a speaker has some private agenda. The Fairness Doctrine serves a visible reminder that broadcasters are indeed responsible for providing balanced views on important issues. Repeal of the Doctrine would eliminate this protection.

Nor can public sentiment in favor of fairness be ignored. Distrust and suspicion of broadcasting will manifest itself one way or another, most likely in ways far more harmful to the media than the Fairness rules. We have already seen the dramatic rise in libel suits and libel awards against the media. If broadcasters succeed in getting the FCC to get rid of the Fairness Doctrine, the industry could easily end up with something far more disconcerting.

Broadcasters also need the Fairness Doctrine for another reason, a reason which either they don't recognize or won't admit. The Fairness Doctrine, reduced to its essentials, is little more than a statement of journalistic ethics. For example, the Code of Ethics, Standards and Practices of the National Broadcast Editorial Association states that: "It is the duty and obligation of every radio and television station to present editorials on issues of public significance in order to serve the needs and interests of the community."

The Code of Ethics of the American Society of Newspaper Publishers states that: "Every effort must be made to assure that news content is accurate, free from bias, and in context, and that all sides are presented farily."

Not surprisingly, Group W stated in its recent comments to the FCC in the Fairness Doctrine Inquiry that the Fairness Doctrine had never caused it to "treat issues in any manner other than it would have done based on reasons of good journalistic practice".[6]

Not only does the Fairness Doctrine mirror journalistic ethics, it also allows journalists to meet ethical standards. Pressure from community groups or the politically powerful to suppress coverage of unpopular issues or support their points of view is common. The broadcaster wishing to resist such pressures can simply point to his or her responsibilities under the Fairness Doctrine. Again, broadcasters themselves have put this point most succinctly. Fisher Broadcasting recently told the FCC that "the doctrine is a standard of excellence in broadcast journalism that the entire broadcast industry should be willing to emulate."[7]

Then why the opposition voiced today to the codification of the Fairness Doctrine? Basically, it comes down to wanting something for nothing. Those that seek it want out of a deal struck long ago. The public interest standard and the concept of broadcasters as public trustees date back to the origins of broadcasting. Back then, anyone who could put up a transmitter could broadcast, and the result was chaos. Broadcasters universally demanded federal government licensing of broadcasting. Congress provided for such licensing, and in return mandated that licenses be awarded on the basis of the public interest. As one of its first acts under the public interest standard, the old Federal Radio Commission, the FCC's predecessor, stated that licensees should provide programming on important issues. This was a fair bargain then, and still is a fair bargain. When one takes notice of the huge sums of money being paid for broadcast properties reflecting overwhelmingly the economic value of the license to broadcast, the bargain seems more than fair.

Not surprisingly, broadcasters haven't advocated getting rid of licensing. That would expose too clearly that the original deal--license for public trust obligations—was dead; and its demise might logically result in a demand for a fee for this

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[3] Public Agenda Foundation, The Speaker And The Listener: A Public Perspective On Freedom Of Expression 38 (1980) (funded by John and Mary Marco Foundation).

[4] Roper Organization, Trends in Attitudes Towards Television and Other Media: A Twenty-Four Year Review 7 (1984). See also R. Bower, Television and the Public 100 (1973).

[5] Roper Organization, supra. n.3 at 10-12.

[6] Comments of Group W in Docket No. 84-282 at 6 (filed Sept. 3, 1984).

[7] Comments of Fisher Broadcasting, Inc. in re Complaint of Syracuse Peace Council against Television Station WTUH at 4 (filed Feb. 25, 1987).

heretofore public resource. But without the Fairness Doctrine, the license would be a sham—an empty shell—it would be a grant without an obligation. The Fairness Doctrine is the heart and soul of the public interest standard.

The underlying Congressional scheme of linking licensing to a public trust is also ignored in elaborate First Amendment arguments against the Fairness Doctrine. For example, critics of the Fairness Doctrine argue that broadcasters should be treated like newspapers for First Amendment purposes. Broadcasting stations, they point out, outnumber newspapers in many communities. Aside from the fact that far more print sources are available in any community than broadcast stations, this argument misses a fundamental point. Broadcast stations, unlike newspapers, are licensed by the Federal government. So long as Congress has created that structure for the grant of valuable privileges, the government constitutionally can and should condition such grant with an obligation to serve the public by imposing the standard of ethics required of every good journalist. Cover the controversial issues in your community and do so in a fair and balanced way. The Fairness Doctrine is not censorship; it is anti-censorship. It requires views to be aired, not eliminated. More positively, the licensing scheme created by Congress provides a unique opportunity to vindicate competing First Amendment values.

One such value was that recognized by the Supreme Court in upholding the Fairness Doctrine in Red Lion: the right of the public to access to contrasting views on important public issues. The Fairness Doctrine has also provided substantial opportunities for speech by those who are not owners of the media of communications. During hearings chaired by Senator Packwood in 1985, groups of both the idealogical left and right testified that they would not have had the opportunity to purchase advertising time or to air their views on programs had it not been for the Fairness Doctrine. This Subcommittee will no doubt receive similar views from similar groups. While the Doctrine does not require that broadcasters provide such on air opportunities, many broadcasters have chosen to do so as a way of meeting their obligations.

Despite the clear record provided by such testimony, the FCC recently concluded that the Fairness Doctrine reduces speech on important issues. The Commission, for no apparent reason, completely ignored the testimony of groups as to the increased opportunities for speech provided by the Doctrine. In essence, the Commission weighed the effects of the Doctrine on speech on a scale with only one side.

The FCC focused only on the supposed chilling effect of the Fairness Doctrine. In my tenure as Chairman of the FCC, I saw no credible evidence of a chilling effect. In fact, in 1979, during my watch, the Commission explicitly found that the Fairness Doctrine enhanced, not reduced, speech. The FCC under my predecessor also conducted a broad inquiry into the effects of the Fairness Doctrine, and in 1974 found no evidence of a chilling effect. This FCC, in finding a chilling effect in its recent Fairness Doctrine report, relied solely on the self-serving anecdotes of broadcasters. The FCC made no attempt to reconcile its findings with those of equally expert Commissions in 1974 and 1979. It cited no changes in circumstances. Really the only change in circumstances is that this Commission is, as the D.C. Circuit Court of Appeals recognized in 1983, "one of the foremost advocates of across the board dergulation for the entire broadcast industry".[8] But care care and caution must be demanded of those wielding the machete in the thicket of regulation.

The Commission ignored a most fundamental point in its analysis of the chilling effect. A chilling effect can only arise among broadcasters who are unwilling to air both sides of an issue, who are unwilling to act as public trustees for those with opposing views on an issue, but who lack the money needed to buy time on the airwaves. Broadcasters need only fear the consequences of decisions to sell their editorial prerogatives to an individual or group representing only one side of an issue. a broadcaster who acts according to the standards of his or her profession, on the other hand, has nothing to fear from the fairness doctrine, since it is only applied in the most egregious cases of imbalance and then the only remedy is to cover the issue further. This point is well illustrated by the *Meredith* case, the only recent case in which the FCC found a Fairness Doctrine violation. There the FCC found that coverage of a nuclear power issue was out of balance by a factor of 13 to 1. Obviously the only people who need be "chilled" by such a decision are those who wish to air such grossly imbalanced coverage. Stripped to its essentials, the chill argument is an attempt to clothe in First Amendment rhetoric a simple, economically

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[8] *Office of Communications of United Church of Christ* v. *FCC*, 707 F.2d 1413, 1443 (D.C. Cir. 1983).

motivated, refusal on the part of broadcasters to air both sides of an issue and give something in return for the grant of a valuable public privilege.

This point brings me back to where I began my testimony. The Fairness Doctrine is an essential part, if not the only remaining part, of a broadcasters' public trustee obligations. Many of us assumed that the Fairness Doctrine was codified by Congress in 1959. That view has now been placed in doubt by Judge Bork. Explicit codification of the Fairness Doctrine is necessary to prevent its subversion or repeal for, if Congress lets that happen, it will have been a party to the gutting of the public interest standard established by it over 50 years ago.

Thank you.

Senator INOUYE. Thank you very much, Mr. Ferris.

Our next witness is the President and General Manager of KNUI-AM of Kahalui, Maui, Mr. Tom Elkins. Mr. Elkins.

Mr. ELKINS. Mr. Chairman and members of the committee:

I am a hands-on owner-operator. I also serve as President of the National Broadcast Editorial Association and as a member of the National Association of Broadcasters First Amendment Committee, and I appear here in those capacities as well.

I appreciate your invitation to be here today and discuss why I and in fact most of us in broadcasting oppose the Fairness Doctrine. In the brief time allocated, I can only highlight the reasons for my opposition. However, I would ask that the memorandum on the doctrine's constitutionality prepared for NAB by Wilmer, Cutler & Pickering be included in the record.[1]

Senator INOUYE. Without objection, so ordered.

Mr. ELKINS. What is wrong with the idea of broadcast stations presenting diverse viewpoints on controversial issues of public importance? Nothing, and my stations do it every day. We would do it if there were no Fairness Doctrine, because we are journalists and getting all sides of the story is just good journalism.

I have been in broadcasting since 1953 and I have been doing editorials on talk radio since 1959. I have always been aware of my ethical responsibilities as a broadcast journalist. In this, I am not different than my print colleagues.

The problem comes when the Federal Government decides that it will hire a staff in Washington to make sure that I am exercising my journalistic judgment the way it wants me to in Hawaii. Someone who has no broadcasting experience at all sits in an office over on M Street and decides if I have done things the way whoever is then on the Commission thinks I should.

That kind of intrusion into editorial judgment has never been tolerated in the print media, and I think it is unconstitutional in broadcasting as well.

Most of us in broadcasting, particularly in radio, are operating our own small businesses. It is difficult, even for those of us with years of experience, to be familiar with all the ins and outs of Fairness Doctrine law that have evolved over time. It is even more difficult to train all of our on-air employees to know the nuances of Fairness Doctrine law.

And so the tendency for some broadcasters is to back off a story that might generate a fairness complaint. Small stations cannot easily absorb the costs that defending such a case might involve. The record of the FCC's fairness doctrine proceedings, and of this

[1] The memor 'um is in the Committee files.

committee, are replete with examples of how the fairness doctrine "chills" the broadcast press.

Supporters of the doctrine argue that it is needed because broadcasting is an influential media. The contention goes that, since we have an impact, our rights should be limited. That stands the First Amendment on its head.

The doctrine's supporters also argue that there is a spectrum scarcity, because not everyone who wants a station can own one. In the broadcasting industry of today, I doubt that there are very many markets where a radio station cannot be had at a fair price. Well, in Hawaii we are suffering from the miseries of abundance. In Hawaii, which is market 72, there are: 52 licensed radio stations, including 29 AM and 23 FM. Nine of these stations are licensed to Maui, but many stations can be heard throughout the islands.

Sixteen television stations (13 VHF, 3 UHF). The stations licensed to Maui are satellites of Honolulu stations.

Eleven low power TV stations holding permits or on air.

Thirteen cable systems serving 105 communities. These systems currently have 216,000 households subscribing. Data available for the Honolulu market shows 66 percent cable penetration.

Five daily newspapers (including one published on Maui), seven weeklies, and 28 specialized periodicals.

KNUT-AM broadcasts a minimum of 5 minutes of news every hour during the broadcast day. That expands to 10 minutes in morning and evening drive time. Additionlly, we have expanded newscasts, at least 15 minutes in duration, at 7 a.m., noon, and 5 p.m.

KHUI-FM carries our expanded 7 a.m., noon, and 5 p.m. newcasts. It also broadcasts hourly 2-3 minute news summaries, and updates as needed.

We have two full-time news people and our morning person also handles some news coverage.

On Maui where I am, three of the nine radio stations have been through chapter 11 bankruptcy.

The fact is anyone who can figure out how to get a station on the air and keep it running can probably have one.

In conclusion, Mr. Chairman, there is no shortage of information sources, either in Hawaii or nationally. But the Fairness Doctrine does have a negative impact on the vigor of the viewpoints expressed by broadcasters. I hope the testimony here today will dissuade you from moving forward with S. 742.

Thank you very much.

Senator INOUYE. Thank you very much, Mr. Elkins.

Our next witness is the President of the Television Station Group, Westinghouse Broadcasting, Mr. Thomas Goodgame.

Mr. Goodgame.

Mr. GOODGAME. Thank you, Mr. Chairman, for the opportunity to appear before the subcommittee today.

I have been a broadcaster for 34 years, including 17 or 18 years in the trenches as a general manager of a television station in Little Rock, Arkansas, Tulsa, Oklahoma, Pittsburgh, Pennsylvania, and Boston, Massachusetts. As broadcast journalists, we yield to no one in defending the fundamental rights of broadcasters under the First Amendment to operate in an open environment, free from in-

trusive government regulation or oversight. However, my experience and that of Group W, the company I represent, has been that the Fairness Doctrine does not hamper broadcast editorial judgment or impair a station's ability to cover matters of controversy and public importance. Group W has never encountered an instance where the duty to cover issues fairly has stilled our editorial voice or caused us to shy away from something we would have otherwise broadcast.

Quite to the contrary, we at Group W have long believed that the doctrine is an essential element of a broadcaster's basic public interest obligation to the community. The principle serves to stimulate robust public debate in the broadcast media on the important issues of the day, not to stifle it. Given the degree to which the public relies on the broadcast media for essential news and information, the relatively straightforward responsibility to seek out and fairly ventilate important public issues is essential to our democratic society.

Even before the Commission first formally articulated the doctrine in 1949, the basic precepts of the doctrine had been adopted by Group W in its operating policy. The concept is so basic to good broadcast journalism that, frankly, at times I find it difficult to find out what all the fuss is all about.

In this respect, the doctrine as a statement of fundamental policy must be distinguished from the manner in which the Commission may choose to enforce it. A policy completely proper on its face could become highly improper if applied in an incorrect manner. For some years now, the Commission has followed the practice of ruling on individual Fairness Doctrine complaints involving a specific issue, program, or series of programs. While the Commission has recognized as a general rule that it must walk a delicate line and has accorded broadcasters wide discretion, I recognize the concern that the process could become too intrusive on day to day editorial and program judgments.

This case by case approach was not explicitly contemplated by the Commission when it adopted its landmark 1949 Editorializing Report. It developed on a largely piecemeal basis thereafter. As I look at the arguments advanced by the critics of the doctrine, they often seem to be addressed more to this method of administration rather than to the basic precepts of the doctrine itself.

The Commission, in response to Congressional mandate, has recently instituted an inquiry to examine alternative ways in which the doctrine could be administered. Group W supports this effort. Unlike the equal time provisions of Section 315, for example, the immediate case by case adjudication of individual complaints is not essential to the vitality of the doctrine. Indeed, case by case enforcement does not provide the best perspective from which to judge station performance, due to the limited focus on only the specific issue or programs named in the complaint. This is too narrow a basis on which to measure compliance with a policy which is directed to overall performance and accords wide discretion to the broadcaster. Rather, the broadcaster's overall practices and record should be the appropriate scope of inquiry.

The history of the Fairness Doctrine to date has been one of evolution. There is no reason why this evolutionary process should not

be expected to continue, consistent of course with the basic precepts of the doctrine.

And I might add that my vital concern is that, since our company has been in the broadcast business from inception—we were the first commercial broadcaster, operating a radio station in 1920, and have been in that business ever since—that we are now faced with a dilemma where many people who do not understand basic journalism, do not understand the precepts that have guided this business through 65 years, are now taking control of this industry. And I think the Fairness Doctrine has even more importance at this time than it has at any time in the past.

With these introductory remarks, I will be happy to respond to any questions and look forward to the discussion.

Thank you very much.

Senator INOUYE. Thank you very much, sir.

Our next witness is the News Director of WBRZ of Baton Rouge, Louisiana, Mr. John Spain.

Mr. SPAIN. Thank you. First let me say, Mr. Chairman, that I appreciate the opportunity to discuss the effect of the Fairness Doctrine on the practice of electronic journalism today.

My name is John Spain. I am News Director of WBRZ-TV in Baton Rouge, Louisiana. I have been a journalist for 20 years and a news director for 12 years. I am the immediate Past President of the Radio-Television News Directors Association and a member of the NAB First Amendment Committee.

Supporters of the Fairness Doctrine like to quote statistics to prove that, because relatively few fairness complaints are acted upon by the FCC, the Fairness Doctrine is really not burdensome for responsible broadcasters.

Those statistics do not reflect the real effect of the doctrine on broadcast journalism, how it is used to inhibit and harass, and how much effort, time and money stations expend whenever licenses are threatened by a fairness complaint.

Let me give you an example from my own experience. When nuclear energy became an important issue in our community, our news department addressed the subject with regular news coverage, including reports on our newscasts and an hour-long documentary. We thought we were covering the subject fairly and completely.

A small but vocal local group complained that we had not presented their view fairly. They made a series of demands, saying that if those demands were not met a complaint would be filed with the FCC under the Fairness Doctrine.

We spent 45 days pulling together the information needed to refute their allegations. During those 45 days, we stopped covering the nuclear energy story in our community.

After we laid the documentation before them, they agreed that we had in fact been fair and we resumed our coverage.

Later the same thing happened with the same group, on yet another issue.

The effect of the Fairness Doctrine in this case is clear. It caused my station to spend a substantial amount of time and money to amass a report to prove what we already knew, that we had been fair. In the meantime, we stopped covering a very important story.

Our audience would have been better served if we had continued to cover the story and been able to invest the wasted resources in that coverage.

And there is nothing to keep it from happening again.

I believe, and the Radio-Television News Directors Association is officially on record to this effect, that the public would be better served if we were permitted to do our jobs, just as our colleagues in the print media do theirs.

We have heard the arguments used to try to persuade us that we are somehow different from print journalists, but I really think all journalists serve the public interest equally. If we did not, our viewers, our listeners, and our readers would let us know about it by simply not watching, listening to, or buying our product.

Today most of the people in this country get most of their news from radio and/or television. The number of sources of news grows larger every day. I have included with this statement an appendix listing all the information sources in my own city. Scarcity—if there is a problem, I think it is with saturation, too much information rather than too little.

Most of the people in this country get most of their news from radio and/or television. The number of sources of news grows larger every day. I have included with this statement an appendix listing all the information sources in my city. Scarcity? If there is a problem, I think it is with saturation; too much information rather than too little.

The FCC has concluded that the Fairness Doctrine does not work. The courts are taking a long look at the same question, and I am glad that Congress is, too. I believe the evidence clearly shows that it is time to abandon the fiction that the Fairness Doctrine is accomplishing its purpose and accept the reality that just the opposite is true.

In the Baton Rouge SMSA, which is market size 91, there are:

Eleven radio stations, including one all-news station and two that program talk shows.

Two VHF and two UHF television stations now on the air with one UHF station and one LPTV station to go on the air before the end of the year.

Three separate cable companies (60 percent cable penetration), each programming more than 30 channels.

Three daily newspapers: one morning, one evening and one Sunday; four weeklies and six suburban.

WBRZ-TV programs 3 ½ hours of news a day. Most of the information programming is produced locally. WBRZ-TV is also affiliated with the ABC, CONUS and NIWS networks, which deliver to our newsroom in excess of 300 additional news stories a day.

Thank you very much, Mr. Chairman.

Senator INOUYE. Thank you very much, sir.

Our next witness is Professor Robert Shayon of the Annenberg School of Communications, University of Pennsylvania.

Mr. SHAYON. Thank you, Mr. Chairman and members of the committee.

You have my prepared statement, in which I set forth my continuing interest in the Fairness Doctrine, review the arguments pro and con during the past debates, and urge you to pass the Fair-

ness in Broadcasting Act of 1987. These are the four main points in my statement:

One, the Fairness Doctrine is constitutional. The Supreme Court in Red Lion said so and, in spite of occasional rumblings of individual Justices, until the High Court overturns it Red Lion is the law of the land. Making the Fairness Doctrine explicit in the Communications Act does not violate the Constitution.

Two, scarcity of spectrum space is still an inescapable fact, in spite of the proliferation since Red Lion of new technologies of communications. Scarcity was the fundamental premise on which the Fairness Doctrine was founded, and it still exists.

The proliferation of channels does not ensure genuine diversity of political, moral, or aesthetic speech. The channel proliferation we are witnessing merely circulates the same programs through more pipes or, as the cable people put it, through more "windows of opportunity."

No less an authority than Edward O. Fitts, President of the National Association of Broadcasters, testified to the scarcity of spectrum space in a December 1986 keynote address at a conference on high definition television at the Washington program of the Annenberg Schools. Mr. Fitts was speaking of competition between land mobile radio users and broadcasters for high frequencies which the broadcasters want for high definition television, but what he said can be generalized to all users of the spectrum. I quote:

> No one challenges the fact that valuable spectrum space is scarce. We acknowledge that there are conflicting demands on that spectrum. But we do think the FCC is in danger of ignoring one inescapable fact. That is, this valuable spectrum space should be used to serve all the public. It should not be handed over to a few hundred business users per market who make inefficient use of the frequencies they now have.

Three, not all broadcasters are "chilled" by the Fairness Doctrine. Representative of those broadcasters is, of course, Group W, the Westinghouse Broadcasting Company, which has consistently supported it.

Four, far from chilling public dialogue on controversial issues, the Fairness Doctrine actually enhances it by compelling broadcasters to negotiate with citizen groups in order to avoid lengthy FCC and court procedures. The managers are thus sensitized to the opinions of racial, political, and ethnic minorities in their communities. Absent the Fairness Doctrine, station managers would have no incentive to engage in such useful democratic dialogue.

This latest attack on the Fairness Doctrine is like the Battle of the Bulge in World War Two—a last, desperate attempt to stave off defeat. I say send in the reinforcements, block that kick, close that loophole. Pass the Fairness in Broadcast Act of 1987.

Thank you.

[The statement follows:]

STATEMENT OF ROBERT L. SHAYON, PROFESSOR OF COMMUNICATIONS, ANNENBERG SCHOOL OF COMMUNICATIONS, UNIVERSITY OF PENNSYLVANIA

I am Robert Lewis Shayon. Since 1965 I have been teaching communications to graduate students at The Annenberg School of Communications at the University of Pennsylvania. Every Spring I give a course called BROADCASTING AS A SOCIAL INSTITUTION. Every Spring network executives, local station managers, advertisers, news directors, Wall Street communications stock analysts and former Chairmen of the FCC come and spend two hours exchanging views on the Fairness Doctrine, among other subjects. My strong interest in the Fairness Doctrine began in 1950 when I became TV critic and editor of SATURDAY REVIEW magazine and subsequently wrote many articles for twenty years commenting on the up again, down again fortunes of fairness in broadcasting. Before that I had been a working producer-writer-director who had the privilege of working under Edward R. Murrow who asked me to establish the Documentary Unit at CBS during radio days. I have also worked for NBC, for PBS, for ABC and for Group W. I have known personally many leaders, on both sides, pro and con the Fairness Doctrine. I have testified twice before Congressional committees. And what brings me here to the barricades a third time? Why, my good old friend, the Fairness Doctrine.

In preparing for this round, I looked through my files and library shelves and realized that the Fairness Doctrine is like a merry-go-round: the music goes round and round and you hear the same old arguments, pro and con, from people who are expert, equally zealous, and all fervently dedicated to the public interest. They all pay lip service to the ends sought by the Fairness Doctrine -- the right of the people to hear all sides of important controversial subjects. But they differ on means, on methods. One side, the opponents of the Fairness Doctrine, say, "Trust us. We're decent, patriotic citizens. Give us the First Amendment rights enjoyed by the print publishers and we'll ensure that the millenial goal of fairness will be realized. Don't restrict, censor, harrass and inhibit our naturally noble instincts. And if there are shortcomings, don't worry --that mythical, heroic institution of American enterprise, the marketplace will make the necessary adjustments."

On the other side, the proponents of the Fairness Doctrine say: "This is not the best of all possible worlds. Maybe many of you are naturally noble and will make sure the public hears all points of view on controversial issues, but given this world, some of you may be less than virtuous. The American political system is founded on the notion of checks and balances. The Fairness Doctrine is the mildest of halters on your neck. You asked for it, you volunteered for the license to profit financially by it. We can't trust your rhetoric: we want to ensure that your actual behavior will live up to your promises. We know this impugns your integrity, irritates and frustrates many of you, but the Fairness Doctrine is a tradition built up through many years. The Fairness Doctrtine is the law of the land, the Red Lion decision has never been overturned. It's constitutional, and sorry, brother, you must abide by it, however much you fume and fret.

So, what's new this time? It seems that a certain Appellate Court decision has raised doubts about whether or not the 1959 amendments to the Communications Act were explicit enough. So now comes this Fairness in Broadcast Act of 1987 to remove those doubts, to make the doctrine statutory and legal. "Down with it!" cry the opponents. "Things have changed since Red Lion. Scarcity, the premise of the licensing scheme has been annihilated by new technologies! Now television and radio can be grown up media, just like the newspapers and magazines. If television doesn't inform the public in their local areas, why, they have lots of chain newspapers to read, lots of local independents to pick up the slack, lots of satellites, cable networks and VCRs. It's a cornucopia, it's a brand new ballgame."

Well, does a proliferation of channels provide diversity? Or more of the same programming and ideas circulated through more pipes or "windows of opportunity," as the cable people say in their jargon? And do all broadcasters agree with the current FCC? Just last December I participated in a Washington conference on High Definition Television, and Edward Fritts made the keynote speech. Who is Mr. Fritts? He's the President of the National Association of Broadcasters, the industry trade association. And what did he say? Let me quote Mr. Fritts. "No one challenges the fact that valuable spectrum space is scarce. We acknowledge that there are conflicting demands on that spectrum. But we do think the FCC is in danger of ignoring one inescapable fact. That is, this valuable spectrum space should be used to serve all the public. It should not be handed over to a few hundred business users per market who make inefficient use of the frequencies they now have." Of course, he was talking about land mobile radio users, who are in competition with broadcasters for upper frequencies that can be used for high definition television. The point is he said that the spectrum is limited and cannot accommodate anybody that wants to use it. What's new, then? The spectrum is still scarce, still valuable, and still should be used to serve all competing players in the game, including the public.

So, what else is new? This time, in the FCC's report on the Fairness Doctrine, there's a lot of anecdotal material from broadcasters and managers who offer case histories of how the Fairness Doctrine harrassed and intimidated thm in their coverage of controversial issues, how it "chilled" them as they did the job they volunteered to do when they applied for their license. There are horror stories of how much it cost them in legal fees to fight the complaints, of how it drained off the mental and physical energies of their staffs who spent time working on legal matters when they should have been attending to their real jobs of making programs and selling commercial availabilities. But neither is that really new. Broadcasters have been crying in their profit sheets as they unfolded these tales for years. On the other side, however, there are any number of broadcasters who say that the Fairness Doctrine gives them no problems at all.

I think if I were a broadcaster, I'd also have no problems with the Fairness Doctrine. I would be positively ferocious in seeking out controversies and inviting people to argue on different sides of issues. What, then, would be the difference between me and the broadcasters? The profit margin -- that would be the difference. I would be willing to pay the price of some diminution in the sale of my fixed inventory of availabilities so that I could give the community of my license something in return for what the public gave me.

And as for "chilling" the public discourse, the way the Fairness Doctrine works, citizen groups and complainants actually enhance that discourse by compelling the licensees to enter into negotiations with them for satisfaction of their complaints. Wiothout the Fairness Doctcrine, there would be no such negotiations, no such enlightening sharing of views. The managers of stations need such interaction: it sensitizes them to the fact that more than time-buyers are involved in their activities, that there is a community out there they are supposed to be interesrted in, not as so many eyeballs to catch and sell to advertisers, but as people with problems, anxieties, hopes and real needs.

Until the court overturns Red Lion, the duty of the Congress is clear. Speak for your constituents, all of them, not just for the broadcasters or the newscasters but for the general public out there that wants to, that needs to hear all sides of controversial issues of public importance to do their jobs as informed citizens of a republic. Send in the reinforcements. Block that kick. Close up the loophole. Pass the Fairness in Broadcast Act of 1987. Thank you.

Senator INOUYE. I thank you very much, sir.

Our next witness is the President of Freedom of Expression Foundation, Mr. Craig Smith.

Mr. SMITH. Thank you, Senator.

As a professor of ten years and head of a research institute, I have always been fascinated by the fact that a communications revolution began in 1476 when Johannes Guttenberg printed the Bible in Mainz using movable type. Rulers such as King Henry VII of England, when movable type arrived there, feared the power of this new force.

English monarchs used licensing, prosecutions for seditious libel, and grants of monopolies to loyal printers to restrict the free flow of ideas. King Henry VIII required prior approval for all printed works, and after him the infamous Star Chamber applied the rule of seditious libel to quash resistance to the Crown.

Many of these restrictions were forced on early American colonists, but 3,000 miles of ocean and an independent spirit allowed the free press to flourish in America. It was the press that disseminated Patrick Henry's Stamp Act speech in 1765, and news of the Boston Massacre in 1770. So when revolution finally came in 1776, many colonies wrote into their declarations of independence and constitutions provisions guaranteeing free press and free speech.

In 1791, the First Amendment was added to our Constitution to ensure that speech and press would be forever free from Federal controls. Although there were only eight daily newspapers at the time—all of which were highly partisan, I might add—the founders accorded the highest degree of protection to those papers.

The founders sought to create a free and open marketplace of ideas, to be guided by the will of the people, not by those whom they elected or their surrogates. Only a vigorous press, unencumbered by government controls, could bring their dream to reality.

Thomas Jefferson wanted America to be a unique place, "where we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it."

When this country decided to regulate the content of broadcast speech, it did a terrible injustice to the spirit and intent of the founders. This committee can correct that injustice by facing up to the evidence in its earlier hearings and the FCC's latest fairness report and by repealing the doctrine.

Surely in a democracy such as ours, where freedom of expression is so highly valued, the burden of proof ought to be on those seeking to impose Government restrictions, not on those who are providing more and more diversity of news and information in the marketplace every day.

Thank you.

[The statement follows:]

Statement of Craig R. Smith, President, Freedom of Expression Foundation

INTRODUCTION

I would like to thank Senator Hollings, Senator Inouye, and the members of the Communications Subcommittee for inviting me to present the views of the Freedom of Expression Foundation regarding the fairness doctrine. The Foundation is a non-profit research organization whose members form a broad-based coalition of media firms, motion picture companies, advertising agencies, telecommunications suppliers, labor unions, and large and small corporations with an interest in freedom of expression. Hearings held by the Committee on Commerce, Science, and Transportation in 1982 on freedom of expression were the inspiration for the research and educational programs that we have conducted over the last four years.

The Foundation believes that this Committee's hearings[1] and the FCC's 1985 Fairness Report contain clear and convincing evidence that the scarcity rationale, the regulatory underpinning for government content controls, is no longer valid. Moreover, the evidence demonstrates that the fairness doctrine has an unconstitutional chilling effect on protected speech. For those and other reasons we urge this Committee to repeal, rather than recodify, the fairness doctrine.

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[1] See Freedom of Expression: Hearings Before the Sen. Comm. on Commerce, Science, and Transportation, 97th Cong. 2d Sess. (1982) (3 days of testimony) [hereinafter "1982 Freedom of Expression Hearings"]; Freedom of Expression Act of 1983: Hearings Before the Sen. Comm. on Commerce, Science, and Transportation, 98th Cong., 2d Sess (1984) (3 days of testimony) [hereinafter "1984 Freedom of Expression Hearings"].

THE SCARCITY RATIONALE IS NO LONGER VALID

The fairness doctrine is predicated on the notion of spectrum scarcity,[2] which was articulated by the Supreme Court in 1943. In National Broadcasting Co. v. United States, the Court stated: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to government regulation."[3] This is the scarcity rationale. Set down when there were less than a thousand AM radio stations in the entire United States -- no FM, no television, no cable television. Scarcity was used to justify the promulgation of the fairness doctrine by the FCC in 1949, by the Congress in 1959, and by the Supreme Court in its 1969 Red Lion decision upholding the constitutionality of the doctrine. (The Court has, however, recently indicated its willingness to reconsider the validity of the scarcity rationale.)[4]

The Foundation believes that using scarcity as a rationale for imposing content controls flies in the face of our democratic heritage. The Founders never considered scarcity as a tool for regulating the press. Indeed, when the First

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[2] See National Broadcasting Co. v. United States, 319 U.S. 190, 215-16 (1943); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).
[3] 319 U.S. at 226.
[4] FCC v. League of Women Voters of California, 104 S. Ct. 3106, 3116 n.11 (1984).

Amendment was added to the Constitution in 1791, there were only 8 daily and a handful of weekly newspapers in the United States, yet all of these outlets were accorded full freedom even though starting a newspaper at the time was an immensely expensive and risky undertaking. Clearly, scarcity was never a concern of the Founders.

But even if it were a valid rationale at some point in time, it is not now. Broadcast outlets now greatly outnumber daily newspapers. The inconsistency of the government's treatment of the printed versus the electronic media was not lost on Judge Robert Bork and Judge (now Justice) Antonin Scalia, who expressed the view in Telecommunications Research and Action Center v. FCC that scarcity is a relative term that is an illogical basis for regulating the content of electronic communication:

> It is certainly true that broadcast frequencies are scarce but it is unclear why that fact justifies content regulation of broadcasting in a way that would be intolerable if applied to the editorial process of the print media. All economic goods are scarce, not least the newsprint, ink, delivery trucks, computers, and other resources that go into the production and dissemination of print journalism. Not everyone who wishes to publish a newspaper, or even a pamphlet, may do so. Since scarcity is a universal fact, it can hardly explain regulation in one context and not another. . . .
>
> One might attempt to resolve the tension between Tornillo and Red Lion on the ground that, while scarcity characterizes both print and broadcast media, the latter must be operating under conditions of greater "scarcity" than the former. This, however, is unpersuasive. There

is nothing uniquely scarce about the broadcast spectrum.[5]

Today's media marketplace is characterized by great abundance and diversity. There are now over 10,000 radio stations and almost 1,300 television stations, which reach 98.2 percent of all U.S. households. By comparison, there are only 1,700 daily newspapers in the country. Over 96 percent of television households receive five or more television signals, more than 71 percent of U.S. TV households receive nine or more television stations! Nine or more! Many major cities, however, have only one or two daily newspapers. With so many television stations competing for audience shares, it's no wonder that hundreds of allocated channels in large and small markets go wanting because they are not economically viable.[6] Even proponents of the scarcity rationale can not claim that the number of people wanting licenses in these markets exceeds the number of licenses available. What may be scarce is enough of an audience to give a station viability. Once a license is obtained the station must gain a large enough share of the audience to provide an income to keep the station going. What scarcity advocates confuse is the difference between a licensed frequency, which is relatively worthless, and a broadcast station that has become successful through creative and desirable programming. The earned audience share determines

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[5] Telecommunications Research and Action Center v. FCC, No. 85-1160, Slip. op. at 15, 16 n.4 (D.C. Cir. Sept. 19, 1986), pet. for rehearing en banc denied, (Dec. 16, 1986).

[6] See Television Channel Utilization, FCC No. 1053 (Nov. 29, 1985).

whether a station is viable, not the federal government through its license power, and not the number of outlets available.

In 1952, three years after the FCC announced its fairness policy, there were only 70 operating cable systems with an estimated 14,000 subscribers.[7] Today, there are approximately 7,300 cable systems in the United States reaching almost 39 million subscribers -- 46% of the nation's TV households.[8] More important, cable is available to more than two-thirds of American homes. Most systems now offer 20 or more channels. Additionally, the Cable Communications Policy Act of 1984 allows communities to establish public, educational and government access channels for systems with 36 or more channels. These channels provide easy access for local groups to disseminate their views, access that is easier to achieve than getting an opinion in the local newspaper.

Radio continues to expand at a rapid pace as more efficient spectrum management techniques allow the FCC to allot hundreds of new FM stations every year.[9] More important, in almost every market all news and all talk radio formats are in the top five listings providing audiences with round the clock news and easy access for opinion dissemination. Consumers are also benefiting from the introduction of hundreds of low power television stations, which obtain and provide news and

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[7] Report Concerning General Fairness Doctrine Obligations of Broadcast Licensees, 58 Rad. Reg. 2d (P & F) 1137, 1187 (1985) [hereinafter "1985 Fairness Report"].
[8] See Broadcasting/Cablecasting Yearbook D-3 (1986).
[9] See Report and Order in Docket No. 80-90, 53 Rad. Reg. 2d (P & F) 1550 (1983).

information almost exclusively for local communities. It is predicted that this source will add an additional 4000 television stations to the marketplace. Additionally, there are numerous multipoint distribution and satellite master antenna systems that increase consumer choices. The problem is not scarcity of diverse news, opinion, and entertainment programs; the problem is trying to choose between all of the available choices. You need a TV Guide, a cable guide, and a legal pad to figure out just one night's viewing! The fact is that the explosion in broadcast outlets has decimated the scarcity rationale, a rationale, I would remind you, that the Founders did not embrace.

Clearly, if scarcity existed at one time, it is no longer a valid justification for imposing content controls on radio and television. The FCC's 1985 Fairness Report concluded:

> [I]n light of the substantial increase in the number and types of information sources, we believe that the artificial mechanism of interjecting the government into an affirmative role of overseeing the content of speech is unnecessary to vindicate the interest of the public in obtaining access to the marketplace of ideas.[10]

Some commentators, however, insist that we treat the broadcast media as a scarce public resource until there is one broadcast frequency for every American.[11] Until such a time as demand exceeds supply, they argue, government must oversee the flow of information that is broadcast. The Foundation believes that

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[10] 1985 Fairness Report at 1148.
[11] See, e.g., Ferris and Kirkland, Fairness -- The Broadcaster's Hippocratic Oath, 34 Cath. U.L. Rev. 605, 611 (1985).

these arguments based on the actual number of people who can or cannot obtain broadcast licenses are not the proper focus of the debate. As Judges Bork and Scalia pointed out in the TRAC case, not everyone has the resources to publish a newspaper or even a handbill; that economic shortfall, however, does not justify government content regulation of the print media. Since economic scarcity is not a justification for limiting the First Amendment freedoms of the print media, it is an improper criteria for imposing broadcast content controls. Broadcast properties can be purchased, just like newspapers, on the open market. One media broker at hearings before this Committee in 1982 testified that they are more available than newspaper properties, and that on average it is cheaper to buy a radio station than it is to buy a daily newspaper.[12]

The Framers of the First Amendment believed a free and vigorous press would educate and inform. They wanted to ensure that the public could make important decisions. The proper focus, therefore, of any scarcity analysis should be the actual number of programming options available to the individual consumer. After all, the basic premise of the fairness doctrine is not that everyone ought to have their own frequency, but rather, that the public is exposed to diverse views on important public issues. The current media marketplace now more than insures that exposure; anyone who doubts that need only twist their radio's tuner or flip through their television channel

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[12] 1982 Freedom of Expression Hearings at 141-53 (statement of Joseph M. Sitrick, Blackburn & Company).

selection. Besides ABC, CBS, NBC, and CNN, many local stations are using satellite transmissions to produce their own national news. Forty-eight stations -- and the number increases every month -- have formed a consortium, each with a satellite van that can transmit live from almost anywhere in the country for only $15 a minute. And group broadcasters are not only developing alternate programming, they are developing strong news services. For example, Westinghouse has developed Newsfeed, which now serves at least 80 local stations.

Thomas Jefferson once said that "laws and institutions must go hand in hand with the progress of the human mind . . . as new discoveries are made [and] . . . with the change of circumstances, institutions must advance also to keep pace with the times." Circumstances have changed. Instead of recodifying the fairness doctrine, this Committee should recognize the abundance of programming options available to consumers. Surely in a democracy such as ours, where freedom of expression is so highly valued, the burden of proof ought to be on those seeking to impose restrictions, not on thousands of small local stations which are providing more and more diversity in the marketplace everyday. The validity of the fairness doctrine rests upon a premise that has disappeared, and its continued enforcement is unconstitutional.[13]

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[13] See United States v. O'Brien, 391 U.S. 367, 377 (1968); Geller v. FCC, 610 F.2d 973, 980 (D.C. Cir. 1979) ("Even a statute depending for its validity upon a premise extant at the time of enactment may become invalid if subsequently that predicate disappears."); See also Home Box Office v. FCC, 567 F.2d 9, 36 (D.C. Cir.) cert. denied, 434 U.S. 829 (1977).

THE FAIRNESS DOCTRINE HAS AN UNCONSTITUTIONAL CHILLING EFFECT ON PROTECTED SPEECH

Any law or practice which, while not directly prohibiting the exercise of First Amendment rights, nevertheless has the effect of seriously discouraging the exercise of those rights, may be said to have a "chilling effect."[14] The Supreme Court has indicated that it would reconsider its Red Lion decision if it were shown that the fairness doctrine discourages speech on controversial issues.[15] The FCC's 1985 Fairness Report and this Committee's extensive and exhaustive hearings of 1982 and 1984 provide clear evidence that the doctrine has the unintended effect of chilling speech. Numerous commentators and scholars agree.[16]

Those Committee hearings revealed that the fairness doctrine was used by various special interest groups to keep opinions they opposed off the air. Take for example the braggadocio on the part of the Special Projects Director of one such group who described how her organization used the fairness doctrine to kill the Equal Rights Amendment. She stated before this Committee: "If it were not for the fairness rules that the women of

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[14] See Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965); NAACP v. Button, 317 U.S. 514, 533 (1963) ("The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.").

[15] See Red Lion Broadcasting Co. v. FCC, 395 U.S. at 393; FCC v. League of Women Voters of California, 104 S. Ct. at 3117 n.12.

[16] See, e.g., Krattenmaker & Powe, The Fairness Doctrine Today: A Constitutional Curiosity and an Impossible Dream, 85 Duke L. J. 151, 162-63 (1985); Menkes, The Fairness Doctrine: Fair To Whom, 30 Clev. St. L. Rev. 485, 519 (1981).

Eagle Forum invoked at the local level . . ., it is entirely possible that the ERA would have been ratified . . . ."[17]

Raymond Saadi, Vice President and General Manager of KHOM, a small radio station in Houma, Louisiana, summed up the problems of local broadcasters when he stated:

> [T]hese regulations chill editorial discretion and cause self-censorship. . . . We do not have as small broadcasters, the resources and time, people or finances to deal with fairness doctrine complaints from groups and individuals who are not our listeners, not in our audience, and are miles away.[18]

Without the resources to challenge even frivolous complaints, many broadcasters, such as Ray Saadi, simply cave in and give away free time. Others, however, feel that nuisance complaints inspired by the fairness doctrine should not be tolerated, no matter what the cost is in time and dollars. For example, NBC and one of its local affiliates became embroiled in a fairness complaint over their broadcast of "Holocaust." Friedrich Berg filed a complaint with the FCC criticizing NBC for its April 1978 mini-series, which he denounced as "generally anti-German and pro-Jewish." Berg said the program's content was false and malicious, and he argued that NBC violated the fairness doctrine by failing to afford reasonable opportunities for the presentation of views opposing "the allegation [in Holocaust] of a German policy of Jewish extermination during World War II." After a hearing, the FCC concluded that Berg's allegations were

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[17] 1984 Freedom of Expression Hearings at 132 (statement of Elaine Donnelly).
[18] Id. at 126.

unsubstantiated.[19] The FCC and NBC wasted over a year's time on this fairness doctrine complaint.

Other witnesses at this Committee's 1984 hearings spoke of the desire to play it safe and avoid controversial issues.[20] Eugene Wilkin of KREM-TV in Spokane, Washington, recounted how the fairness doctrine had cost him his job and reputation.[21] KREM had taken a strong stand in favor of bringing the World's Fair to Spokane. Immediately after its editorial, four people went to the station to demand free reply time. Although claiming to represent the environmentalists in the area, these people turned out to be a splinter group of eight neighbors who formed their own ad hoc committee. After a lengthy struggle to keep their license, KREM was vindicated and cleared of all charges. Defending this fairness complaint cost KREM $20,000 in legal fees, 480 hours of executive time, and a delay in their license renewal. It also cost Wilkin his job.

Some people argue that these and other statements by broadcasters are self-serving and therefore should be ignored. They say even if we accept these statements as true, there aren't enough of them to conclude that there is a chilling effect. I disagree for at least two reasons. First, these horror stories circulate in the broadcast community, and chill

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[19] Application of National Broadcasting Co. for Renewal of License of Station WNBC-TV, New York, 71 F.C.C.2d 250 (1979).
[20] 1984 Freedom of Expression Hearings at 150 (statement of J. T. Whitlock, Lebanon-Springfield Broadcasting Co.) (avoided editorializing because of costs to defend groundless fairness complaints); id. at 127 (statement of Dean Mell) (fairness doctrine intimidates broadcasters and often dictates that "its wiser to scrap the whole project" rather than probe controversial issues.)
[21] Id. at 227-28.

the speech of all broadcasters. The arbitrary nature of the application of the doctrine leads many to believe that lightning could strike at any time. Second, broadcasters have a constitutional right to challenge laws that they feel violate their First Amendment rights. Those who speak out are the courageous few who aren't intimidated by the fact that "anything you say can and will be used against you" at license renewal time. The timidity of broadcasters to speak out merely strengthens the argument that fairness enforcement has a chilling effect.

ENFORCEMENT OF THE FAIRNESS DOCTRINE DRAWS THE GOVERNMENT INEXORABLY INTO CENSORSHIP OF PROTECTED SPEECH

In assessing the merits of a fairness doctrine complaint, the FCC's staff investigates and resolves questions using their own subjective content analysis. Often the resulting rulings are arbitrary. Commissioner Mimi Dawson said of a recent set of rulings: "[I]t is virtually impossible for a broadcaster to read the instant case and Callaway [a previous decision] and know what its responsibilities are under the fairness doctrine."[22]

Worse yet, the FCC has acknowledged that administering the

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[22] Compalint of Syracuse Peace Council against Television Station WTVH, 99 F.C.C.2d 1389, 57 Rad. Reg. 2d (P & F) 519 (1984), recon. denied, 59 Rad. Reg. 2d (P & F) 179 (1985) (Dissenting Statement of Commissioner Mimi Weyforth Dawson, released March 13, 1985, at 10).

doctrine "inexorabl[y] inject[s] the Commission into the editorial decision making process."[23] The Chief of the Commission's Mass Media Bureau, James C. McKinney, recently described the very unscientific procedure his staff uses to scrutinize the content of each program or advertisement brought to its attention. McKinney stated:

> "We . . . sit down with tape recordings [and] video tapes of . . . what has been broadcast on a specific station. We compare that to newspapers [and] other public statements that are made in the community. We try to make a decision as to whether the issue is controversial and whether it is of public importance in that community, which may be 2000 miles away. . . . [W]hen it comes down to the final analysis, we take out stop watches and we start counting [the] seconds and minutes that are devoted to one issue compared to [the] seconds and minutes that are devoted to the other side of that issue. . . . [I]n the final analysis we start giving our judgment as what words mean in the context of what was said on the air. What was the twist that was given that specific statement, or that commercial advertisement? Was it really pro-nuclear power or was it pro some other associated issue?[24]

The FCC's staff decides whether one broadcast covers the same issue or a different issue as another broadcast. It also assesses the importance of each word or phrase and weighs the potential impact each message will have on the viewing or listening audience. Moreover, the Commission analyzes the content and weighs the impact that particular print articles and statements of public officials will have on the local community. These investigative acts, performed by the government's licensing authority, are blatant intrusions into areas traditionally left to the dictates of the hearts and

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[23] 1985 Fairness Report at 1175.
[24] 1985 Fairness Report at 1175 n.174.

minds of the society at-large. Indeed, the Supreme Court has held on numerous occasions that government balancing or weighing of expression, such as that undertaken by the Commission's Mass Media Bureau in fairness disputes, is the very essence of paternalism and is unwarranted in our pluralistic society.[25] This sentiment was expressed most strongly in First National Bank of Boston v. Bellotti:

> The people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. But if there be any danger that the people cannot evaluate the information and arguments advanced . . ., it is a danger contemplated by the Framers of the First Amendment.[26]

The fairness doctrine is no different from the other content-based regulations held unconstitutional by the Supreme Court. The Court has said that the government cannot seek to protect the public from particular messages it deems are not in the best interests of the community. The process of balancing and weighing the impact of broadcast expression and performing the kind of detailed content analyses described by the Commission's Mass Media Bureau Chief should not be allowed in our democracy. Such acts can only be justified by the notion that the public cannot be trusted to evaluate the relative merits of an argument or the credibility of its source. Such

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[25] See Buckley v. Valeo, 424 U.S. 1, 48-49 (1974); Linmark Associates v. Township of Willingboro, 431 U.S. 85, 96 (1977); Hannegan v. Esquire, 327 U.S. 146, 148-49 (1946).
[26] 435 U.S. 765, 791-92 (1978).

assumptions are unwarranted given what we trust to the public when it comes to political decision making.

THE NATURE OF FAIRNESS DOCTRINE ENFORCEMENT LEAVES OPEN THE POSSIBILITY THAT CONSTITUTIONALLY IMPERMISSIBLE CRITERIA WILL BE SUBSTITUTED IN EVALUATING FAIRNESS COMPLAINTS

Judge David Bazelon recognized the constitutional dangers posed by FCC enforcement of content regulations when he wrote: "Individuals who must first obtain permission to engage in activity protected by the first amendment are vulnerable to the various sub silentio pressures that prior approval permits."[27] As evidence of the political manipulation of broadcasters through governmental pressures, Judge Bazelon observed that President Nixon used the fairness doctrine and the license renewal process in an effort to dissuade the Washington Post from printing the Pentagon Papers.[28] Judge Bazelon also noted that various Nixon administration officials advocated using the FCC and the fairness doctrine for "an official monitoring system" to obtain more favorable media coverage for the President.[29]

In addition to the abuse by a President or his staff, fairness doctrine enforcement policy allows other executive branch offices to intimidate broadcast licensees. For example,

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[27] Bazelon, FCC Regulation of the Telecommunications Press, 1975 Duke L. J. 213, 214 (1975).
[28] Id. at 235.
[29] Id. at 247-48.

the Central Intelligence Agency (CIA) recently brought a fairness complaint against ABC News claiming it violated the fairness doctrine by airing material suggesting CIA involvement in an assassination plot.[30] Although the CIA's complaint was dismissed, the FCC made clear that the CIA's position as a government agency did not deprive it of the standing to bring a complaint. This decision establishes a dangerous precedent. Clearly, the CIA does not need the FCC's help in getting its views heard. Moreover, if the CIA can use the fairness doctrine to intimidate broadcast licensees, then there is nothing to stop other agencies of the federal government, for example, the Internal Revenue Service, from using the FCC to temper the views of radio and television licensees. The head of the CIA is appointed by the President and so are the members of the FCC and other agencies. It is extremely dangerous to rest so much power in so few partisan hands.

Fairness doctrine enforcement is subject to the political biases of the FCC's Commissioners. This bias was duly noted by Justice Douglas in CBS v. Democratic National Committee.[31] Douglas questioned the propriety of Commission decisions that were decided strictly along political party lines. Justice Douglas declared emphatically:

> [T]he regime of federal supervision under the fairness doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive segment

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[30] Central Intelligence Agency v. ABC, Inc., 57 Rad. Reg. 2d (P & F) 1543 (Mass Media Bur.), aff'd, 58 Rad. Reg. 2d (P & F) 1544 (1985).

[31] 412 U.S. 94, 164 (1973) (Douglas, J., concurring).

> of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election.[32]

In the same case, Justice Stewart questioned the validity of any regulation that permitted a politically appointed body to regulate the fairness of a particular message. Justice Stewart said: "Those who wrote our first amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish."[33]

Because enforcement of the fairness doctrine permits the government to inject constitutionally impermissible criteria into the regulation of speech content, it should be repealed not codified.

CONCLUSION

The Foundation advocates extending the same First Amendment protections now enjoyed by the print media to the electronic media. Elimination of the fairness doctrine is not a radical proposition. It is strongly supported by Senator Bob Packwood and Senator William Proxmire, who has tried for 20 years to repeal the doctrine which he tried to codify in 1959. The House Republican Research Committee endorses repeal.[34] Governor Mario Cuomo thinks the fairness doctrine should be

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[32] Id. at 164.
[33] Id. at 145-46.
[34] Ideas For Tomorrow, Choices For Today: Policy Initiatives of the Committee on the First One Hundred Days 8 (1985).

abolished.[35] A substantial number of newspapers, including the Dallas Times Herald, the Hartford Courant, the Miami Herald, the New York Times, the Wall Street Journal, and the Washington Post, have editorialized in favor of repeal (see Appendix A). Many prominent First Amendment scholars including Floyd Abrams, Professor Thomas Krattenmaker of Georgetown University Law School, Professor Lucas Powe of the University of Texas at Austin, and Professor William Van Alstyne of Duke University Law School say repeal is warranted.[36] Additionally, the Society of Professional Journalists/Sigma Delta Chi, the Association for Education in Journalism and Mass Communication, the American Newspaper Publishers Association, the American Society of Newspaper Editors, and many other respected organizations all agree with us that the fairness doctrine should be repealed.[37]

Where speech is not free, men are enslaved. It is time to return to the Founders dream of an educated citizenry informed by open and robust marketplace of ideas. Only then will our democratic republic function properly to support an ever expanding universe of ideas and an ever greater guarantee of liberty.

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[35] Cuomo Wants Fairness Doctrine Repealed, Broadcasting, Mar. 24, 1986, at 44 (In a speech before the International Radio and Television Society, Cuomo stated: "The underpinnings of the fairness doctrine have been undermined by the technological advances of four decades," and the variety of channels available to viewers makes the regulation of fairness obsolete, "especially when it comes to content and programming.").

[36] See 1982 Freedom of Expression Hearings at 68-82, 92-113; 1984 Freedom of Expression Hearings at 21-28, 77-83, 153-60.

[37] See 1984 Freedom of Expression Hearings at 44-74, 206-25.

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United States Senate
COMMITTEE ON FINANCE
WASHINGTON, DC 20510-6200

March 18, 1987

Dr. Craig R. Smith
President
Freedom of Expression Foundation
414 South Capitol Street, S.E.
Washington, D.C. 20003

Dear Dr. Smith:

I would like to ask that you respond to the attached questions in writing, to submit for the March 18th Communications Subcommittee hearing record on Fairness in Broadcasting. I would appreciate your responding to me by Friday March 20.

Thank you very much.

Sincerely,

Bob Packwood

BOB PACKWOOD

BP/jml
Enclosure

Question 1: Dr. Smith, Professor Fisher alleged that many broadcasters are eliminating news and public affairs programming because of radio deregulation. He cited a survey by the Radio-Television News Directors Association to support this argument. Do you agree with Professor Fisher's statement?

Answer 1: I'm glad you asked that question Senator Packwood. There have been a lot of misstatements and conjectures on this issue, much of them coming from Professor Fisher. His characterization of the RTNDA study is totally inaccurate. Far from demonstrating a reduction, the RTNDA study confirms that radio deregulation has caused no change in news or public affairs staffing or programming at the great majority of stations. Specifically, the study shows that for nine out of ten stations, the radio deregulation decision had no impact on the amounts of news and public affairs programming presented. And for those stations reporting changes in the amounts of news programming, there was only a one percent net decrease in news coverage. Furthermore, a later study revealed that television news staffs stayed about the same as before deregulation.

I'd also like to add that radio deregulation has brought about many changes that benefit local listeners by allowing station operators to diversify radio formats. An August 1983 study determined that the total number of radio formats increased 5.2 percent between 1980 and 1983, and in smaller markets the increase was 18 percent. Across the country, the number of radio stations providing black format programming more than 20 hours per week increased by about 15 percent, Spanish language programming increased 56 percent, all-news formats increased 73 percent, and religious programming formats increased over 20 percent.

As you can see Senator, Professor Fisher's remarks on the effect of radio deregulation do not stand up to the facts, and therefore, they should be disregarded by this Committee.

Question 2: Dr. Smith, in your judgment, if there was no fairness doctrine, what would guarantee that radio and television broadcasters provided access for people's opinions?

Answer 2: Senator, I believe that there are numerous non-governmental incentives for broadcasters to provide access to their stations. In the last few years, there has been a great proliferation of programming with many stations carrying all-news, all-talk, and live call-in formats. Indeed, an August 1986 survey of the top finishers in radio stations in markets ranked four through ten showed the profitability of information and access type programming. In San Fransisco, all-talk station KGO(AM) was in first place followed closely by news/talk station KCBS(AM). In Philadelphia, all-news station KYW(AM) was in the top five. In Detroit, WJR(AM) finished second with its talk format and all-news WWJ(AM) was fifth. In Boston, all-talk WRKO(AM) was the city's number-one station. In Washington, D.C., WMAL(AM) a morning-talk station finished third and in

Dallas-Fort Worth, all-news station KRLD(AM) also finished third in the ratings.

It's my opinion, Senator, that marketplace forces, not government content controls, are responsible for the strength of information programming. Many broadcasters will continue to provide access because it's good business, and others will because of journalistic integrity and their sense of responsiblity to the community. The allegations made during this hearing that broadcasters would abandon news-talk and information programming, if there were no government content controls, are unfounded.

Question 3: Dr. Smith, we've heard a lot today about the scarcity rationale, the regulatory underpinning for the fairness doctrine. Do you think that rationale is still valid?

Answer 3: I think the evidence in this Committee's earlier hearings and in the FCC's 1985 Fairness Report would strongly support a finding that the scarcity rationale is no longer valid. During the hearing, Mr. Ferris said content controls were necessary because the demand for broadcast stations exceeds the supply. It's unfortunate that there wasn't enough time for you to get the real story on scarcity from Mr. Elkins, the panelist from KNUI(AM) in Hawaii.

The FCC has allocated 19 television channels to the Hawaii market, but 18 of these channels are vacant. There are 18 channels for the taking and nobody wants them -- 3 commercial VHF channels, 5 commercial UHF channels, 2 non-commercial VHF channels and 8 non-commercial UHF channels. Here is a clear example of supply exceeding demand, yet the government continues to apply the scarcity rationale and impose fairness obligations on these broadcasters. There are hundreds of vacant channels around the country. In South Carolina, there are 3 vacant commercial UHF channels and two vacant non-commercial UHF channels, one of which is in the Charleston market area.

These stations aren't vacant because of technical scarcity. To the contrary, the fact that there are vacant channels shows an over abundance of spectrum space in those markets. The reason they are vacant is purely economic. The market can't support anymore stations.

Question 4: Dr. Smith, in your prepared testimony you state that fairness doctrine rulings are arrived at arbitrarily. You quoted Commissioner Mimi Dawson as saying that recent Commission rulings made it "virtually impossible" for broadcasters to know what their responsibilities are under the fairness doctrine. Can you give the Committee an example of how the fairness doctrine is enforced in an arbitrary and capricious manner?

Answer 4: As I said in my formal statement, Commission enforcement policy is far from predictable. It has always been dependent on a number of different factors, including the disposition of the Commission's politically appointed members.

Licensees find themselves exposed to either harsh or lenient treatment by different Commissions, and the case-by-case application of the fairness doctrine makes it a subjective call for the FCC, which inevitably leads to inconsistent and confusing decisions.

Three recent fairness decisions provide a good example of the arbitrariness of FCC enforcement policy. These disputes presented the Commission with almost identical facts and circumstances, yet a violation was found in only one of the three cases. In Complaint of Environmental Defense Fund against KERO-TV decided in 1982, the FCC found no fairness violation when six California television stations aired a series of 30-second public issue advertisements sponsored by Pacific Gas and Electric (PG&E). The Commission's ruling essentially put licensees on notice that in circumstances where reasonable men viewing the same program or advertisement could reach different characterizations of the issues raised therein, the Commission would accept the licensee's interpretation.

Two years later, in Complaint of Yes to Stop Callaway Committee against Television Station KTVI, the FCC held that a licensee did not violate the fairness doctrine by airing a series of 275 public issue advertisements for the Callaway nuclear plant. Although the Commission accepted the complainant's characterization of the issue as "the need for, and the desirability of the Callaway nuclear plant," it did so because issue characterization was not dispositive in the case. The critical inquiry was whether the advertisements advocating the Callaway nuclear plant discussed a controversial issue of public importance, and on this issue, the FCC sided with the licensee.

The decisions in EDF and Callaway appeared to advance a consistent Commission enforcement policy of deference to the good faith and reasonable interpretations of broadcast licensees. In neither EDF nor Callaway did the Commission inject its own subjective analysis and find a fairness violation.

These results, however, contrast sharply with the decision in Complaint of Syracuse Peace Council against Television Station WTVH in 1985. In Syracuse Peace Council, the Commission contradicted its earlier precedent by ruling that station WTVH violated the fairness doctrine by airing a series of spot advertisements for the Energy Association of New York. In its threshold determination on issue characterization, the Commission ruled that the licensee was unreasonable in characterizing the issue as the need for increased generation of electricity and the need to eliminate dependence on foreign oil. Despite the fact that the advertisements carried in all three cases advocated the need for increased generation of electricity, only in Syracuse Peace Council did the Commission disapprove of the licensee's characterization of the issue.

Clearly, the distinguishing feature between EDF, Callaway and Syracuse Peace Council was not factual because all three cases involved almost identical facts and circumstances. The

Commission, however, distinguished the cases arguing that the complainants in Syracuse Peace Council had presented a better case for Commission intervention. With this pronouncemnet, it became crystal clear that only the FCC, not its licensees, could tell when a violation had occurred. The arbitrary and inconsistent application of the fairness doctrine to the facts in EDF, Callaway and Syracuse Peace Council, prompted Commissioner Dawson to issue a strong dissent focusing on the unfairness of the Commission's enforcement policy. Commissioner Dawson argued that not only was the decision in Syracuse Peace Council factually incorrect, but it represented a serious departure from the Commission's own standards and established precedent. Commissioner Dawson said the most recent fairness doctrine decision would leave broadcasters guessing at their fairness obligations. Specifically, Commissioner Dawson wrote: "[I]t is virtually impossible for a broadcaster to read the instant case and Callaway and know what its responsibilities are under the fairness doctrine."

The full Commission so much as agreed with Commissioner Dawson's assessment when it wrote in its 1985 Fairness Report:

> A broadcaster may be uncertain as to the precise boundaries of our detailed and complex regulatory scheme or may be uncertain as to whether he or she will be able to convince us, in the course of fairness doctrine litigation,that the station's overall programming complies with our regulatory requirements. As a consequence, a broadcaster, in order to avoid even the possibility of litigation, may be deterred from airing material even though the Commission, after hearing all the evidence, would have concluded that the program did not trigger fairness doctrine obligations. Indeed, the uncertainty as to whether or not a broadcast contains information which rises to the level of a controversial issue of public importance may itself have an inhibiting effect.

Because Commission enforcement policy is so unpredictable, many broadcasters avoid controversial issues. This is part of the chilling effect, which I discussed in my prepared statement.

Senator INOUYE. Our final panel witness is the Dean Emeritus of the School of Journalism, University of Missouri, Dean Roy Fisher. Dean Fisher.

Mr. FISHER. Thank you, Senator.

The Fairness Doctrine, far from being an infringement on First Amendment rights, is in fact a mandate to broadcasters to use their First Amendment rights. This mandate is reasonable because the nature of broadcasting is such that full reporting of controversial issues is costly and therefore likely to be neglected.

A precedent for establishing a media standard for serving the public interest exists in the postal incentives offered to newspapers, magazines and books. To qualify for second class postal rates, for example, a newspaper must devote at least 25 percent of its space to editorial matter. This subsidy, like the Fairness Doctrine, arises from the need in a democracy for an informed electorate.

Finally, the Fairness Doctrine provides an incentive for broadcasters to take the initiative in covering public issues, sometimes at the expense of their own ratings. Because coverage of complex issues may attract smaller audiences and because balanced coverage consumes precious air time, compliance with the Fairness Doctrine is seen by many broadcasters as an economic burden. Yet, it is a small price to pay in consideration of the free and exclusive use of their respective slices of the public's air waves.

I wish to add also that the Fairness Doctrine is a standard of expectation established for broadcasting by the people they serve. It thus provides a needed safety valve when the public senses that the media are not serving their best interests.

These are times when many people perceive the media as bigger than life, more powerful than Government, so seemingly friendly and intimate in the living room, yet remote and unreachable. When a citizen feels like telling a broadcaster off or, God forbid, punching him or her in the nose, the citizen realizes, alas, that he is not dealing with an individual but with a corporate conglomerate who does not even know he exists.

But the Fairness Doctrine assures the citizen that he really can be heard. The mere fact that it is there undergirds the faith and confidence and the credibility which is so essential whenever we communicate with one another.

For the sake of the broadcast industry itself, if not for the public, I trust you will preserve this important doctrine.

[The statement follows:]

STATEMENT OF ROY M. FISHER, PROFESSOR AND FORMER DEAN, UNIVERSITY OF MISSOURI SCHOOL OF JOURNALISM

I appreciate the opportunity to appear before you today to support legislation that might ensure the continuation of the Fairness Doctrine. I speak to you from my experience in both the print and broadcast media, and as dean of the school of journalism at the University of Missouri. My newspaper experience was primarily with the late Chicago Daily News, where I served in various capacities, from police reporter to editor-in-chief. My broadcast experience came primarily as the executive responsible for the news and public affairs programming at the University's two stations, KOMU-TV, which is a commercial, NBC-affiliated station serving central Missouri; and KBIA, a public radio station in the same market.

There has been concern from some of my journalism colleagues that the Fairness Doctrine infringes upon our First Amendment rights. The U.S. Supreme Court has held otherwise, but never-the-less that concern persists. I believe such a finding dis-

torts the very purposes of the Fairness Doctrine, ignores the circumstances under which the Doctrine came into being, and flouts the experience we have had under the Fairness Doctrine during the past 50 years.

The Fairness Doctrine's antecedants go back even further than that. While Secretary of Commerce, Herbert Hoover remarked to a colleague that he hoped that the marvelous new medium or radio would become even more than an entertainment and advertising medium, that it would someday be a major force for enlightenment, as well. From that hope came the essences of the Fairness Doctrine. Far from being an intrusion upon First Amendment rights, it was an exhortation to the broadcast industry to use those First Amendment Rights. It was of course, more than an exhortation, it was a mandate, saying that any company granted a license to broadcast would be expected to devote a reasonable amount of time to the discussion of controversial issues.

It does not prescribe how this is to be done, excepting that the broadcaster should attempt to report all sides of an issue—in other words, be fair. To requre a broadcaster simply to be "fair" would appear to be a rather mild imperative. But therein lies the difference between freedom and tyranny. That a mass communications medium should be obligated to report all sides of a dispute—fairly—is a mandate that could be made only in a country that believes deeply in the democratic processes.

For half a century, this revolutionary doctrine has worked pretty well. The fact that our broadcasters today routinely seek to tell all sides of an issue distinguishes them from almost every other broadcasting system in the world.

But as important as the "fairness" portion of this doctrine is, even more important is the first portion: that a licensee must exercise his First Amendment rights, that he must devote a reasonable amount of his broadcast time to the discussion of controversial public issues of importance. Some broadcasters contend that the Fairness Doctrine intrudes upon the licensee's First Amendment rights. They ask, "Why can't the broadcasters be as free as the newspapers?"

Well, perhaps they have forgotten that there is, indeed, a similar standard of performance for newspapers: the second class postal privilege. To be distributed under the low second-class postage rate, a newspaper is required to devote at least 25 percent of its space to news and editorial content. The second class mailing permit, of course, is a government subsidy based upon the concept that the electorate in a free democracy must be informed. The same postal subsidy is granted to the publishers of magazines and books, as well. While most newspapers could operate without a second-class mail subsidy today, those who depend upon the mail for distribution would suffer horribly if that second-class privilege were denied them. Certainly, the high cost of postage has been a major factor in the demise of many high-quality magazines. I know personally of one newspaper that turned its advertising "shopper" into a very good weekly newspaper, primarily to qualify for the second-class mail privilege.

So Secretary Herbert Hoover and his colleagues in the Coolidge administration had a perfectly good precedent when they attached a certain public service standard to a broadcast license. They could not reward stations with lower postal rates, but they could attach that standard of service to the issuance of the free broadcast license. Cover those controversial issues that are important to our society, they said, and we'll give you the use of the public's airwaves free of charge. And that's the way we've worked ever since.

If a better way can be found to remind broadcasters that the public expects them to contribute to the democratic process, let's use it. But until that day comes, the public interest demands that the boradcasters go through the motions and the paperwork that is required to satisfy the FCC that, indeed, that they are earning their licenses. It is, indeed, very little to ask.

There is one more factor which influences the broadcast executives' judgment in this matter which I would like to touch upon. It relates to the different nature of the broadcast medium which accounts for the fact that broadcasters find it much more expensive to report all sides of an issue fairly than do newspaper editors. This is partly because newsprint is more flexible than time, and time, basically, is all that the broadcaster has to sell. To devote sufficient time to a subject to tell all sides of it will require that the broadcaster take time away from some other subject. The newspaper editor, however, can add a couple of pages to his paper, if that be required. The problem for the broadcaster is even more complex than that.

A full discussion of all sides of an issue would not only take more time but it would also increase the likelihood that readers would tire of the subject and switch stations. Even at best, a news director knows that most stories included in his or her program are likely to be of little interest to many of his readers, perhaps even a

majority of his readers. That is why a news director limits most of his news items to 20 or 30 seconds. He calculates that a listener who is bored by the item he is presently listening to will nonetheless stand by for 20 or 30 seconds in anticipation that the next item will be more interesting. In other words, a broadcast news audience is held together only by the anticipation that something good will be coming up next. And, sometimes, of course, it does.

But what happens if the broadcast reporter must not only tell the fresh, scintillating angle of a controversial issue, but must follow that angle with a more labored explanation of what the other side of the issue may be? That costs the station not only time—but something just as valuable as time—listeners.

That, with all respect to my good colleagues in this wonderful business of ours, is why some of them are so jittery about anything that requires a full some discussion. And that—not the fear of license difficulties—is what chills controversy on stations which depend for their survival so heavily upon audience numbers. And so let it be. If they cannot afford to report all sides of all issues, let them select only those issues most vital to their audiences. That's pretty much what the FCC has done in its application of the Fairness Doctrine.

Senator INOUYE. Thank you very much, Dean Fisher. I thank all of you for assisting us this morning.

I would like to recognize Senator Packwood now.

Senator PACKWOOD. Mr. Chairman, thank you.

Dean Fisher, let me see if I understand what you are driving at. Are you saying that broadcasters will not cover controversial issues because they are expensive to cover or for whatever other reasons, unless there is a Fairness Doctrine?

Mr. FISHER. I am saying that broadcasters spend more and risk more when they cover controversial issues than other media do, because of the nature of broadcasting; and that therefore a community standard stating the expectations of the public that they will cover such issues reinforces the desire of those broadcasters who wish to serve the public interest.

Senator PACKWOOD. Well then, let me ask Mr. Goodgame. Mr. Goodgame, in your statement you say:

> Even before the Commission first formally articulated the doctrine, the basic precept of the doctrine has become adopted by Group W as its operating policy, and the concept is so basic to good broadcast journalism that, frankly, at times I find it difficult to figure what all the fuss is about.

I am taking it you are not agreeing with Dean Fisher. You are saying that you would cover these issues and you would do this because it is good journalism.

Mr. GOODGAME. Yes, sir, I say that. But I also say that, if you will pardon me, I think we are an exceptional company. I think there are few exceptional companies out there.

Senator PACKWOOD. You mean other companies are not as good?

Mr. GOODGAME. I go back to my closing remarks. I think that the Fairness Doctrine articulates what we as broadcasters must do in order to hold a license, and the basic issue is that we must be fair, that we must provide a forum.

We are not a newspaper, we are not a magazine. We are a spectrum space allocated by the Federal Government. In exchange for that, I do not think that we as broadcasters have the right to go on and express our own views or the views of an individual party or individual organization, individual special interest group, without providing the opportunity for others to have that same right.

Senator PACKWOOD. Are you saying that you would do that with or without the Fairness Doctrine?

Mr. GOODGAME. Yes, we would. But I think that there is a tendency down the road later or today for people not to do it. We have had testimony here today, and if Mr. Spain will forgive me, they were challenged in your station, as I understand it, by an organization that threatened to go to the FCC.

That stopped that station, according to his testimony or his statement, from covering the event. They were fearful of going to the FCC. Why? That does not make any sense. And why stop the coverage while you spend 45 days investigating? That does not make any sense to me.

That station or any other television station has the obligation, if it believes it has been fair, if it believes it has been appropriate, to proceed.

But that doctrine is not to be feared; it is to be admired from the standpoint of providing that constitutional right to those people who need access to the media.

Senator PACKWOOD. But the key to requiring the use of it is the limited spectrum, is that your argument?

Mr. GOODGAME. No, my argument is that as a basic precept I do not view the—and certainly in a different context, I do not view the Fairness Doctrine any different than I would the First Amendment of the Constitution. I mean, if we do not believe in rules and regulations, why should we have that even?

Senator PACKWOOD. You mean you could apply it to the print press?

Mr. GOODGAME. I do not think that the print press is the issue here. I certainly am concerned as a citizen with the fact that there may be only one newspaper in a town and it might not provide access.

Senator PACKWOOD. Did you say that the Fairness Doctrine is the same as the First Amendment?

Mr. GOODGAME. No, I said in a different context it is the same as the First Amendment. It is a rule and regulation that provides the opportunity for freedom of expression. In that sense they are alike, not to draw a definite line between the two.

I think the First Amendment is an entirely different thing from the Fairness Doctrine in concept totally. But in that sense, they are alike.

Senator PACKWOOD. You are saying the First Amendment is what basically guarantees that broadcasters will provide the diversity?

Mr. GOODGAME. No.

Senator PACKWOOD. I do not understand what you are saying.

Mr. GOODGAME. Well, I do not understand your question, then, because quite frankly I feel like that the Fairness Doctrine ensures that people who are dealing with issues, not with elections—obviously that is 315—have access to the media, to the electronic media.

I feel like the Fairness Doctrine does that, and it is important for us to have.

Senator PACKWOOD. Now I understand what you are saying. Yes, the Fairness Doctrine when fully applied does guarantee that. It makes sure that you will put somebody else on. You are not equating it with the First Amendment.

But are you saying that without that Doctrine you would not do it? The print media does not have it; are you saying they do not do it?

Mr. GOODGAME. No, I am not saying I would not do it. I am saying that everyone here agrees that a journalist who has respect for what is happening in his community, broadcast or otherwise, will make an attempt to cover the issues fairly and squarely. But I think that that does not give either the broadcaster or anyone else the right to deny other people that access.

Senator PACKWOOD. Let me ask Mr. Shayon one question. I have a lot more, Mr. Chairman, but I know my time is limited.

Mr. Shayon, you indicate in part four of your statement:

> Far from chilling public dialogue in controversial issues, the Fairness Doctrine actually enhances it by compelling broadcasters to negotiate with citizens groups in order to avoid lengthy FCC and court procedures. The managers are thus sensitized to the opinions of racial, political, and ethnic minorities in their communities.

Do you think that the print media is therefore insensitive because they are not compelled to do this?

Mr. SHAYON. The broadcast managers do not all know the specific details of how the Fairness Doctrine operates. Many of them are ignorant, particularly in small markets. And when a Fairness Doctrine issue arises, their news people bring it to them and tell them what the Fairness Doctrine is about.

When they realize it, they become aware of their responsibilities to the community as a whole.

Senator PACKWOOD. Thank you, Mr. Chairman.

Senator INOUYE. Senator Pressler.

OPENING STATEMENT BY SENATOR PRESSLER

Senator PRESSLER. Mr. Chairman, I have not made up my mind about how I will vote on this proposal. I am here today to listen and learn. But I do believe basic idea behind the so-called "Fairness Doctrine" is a sound one. The Public needs to know both sides of the issues.

Whether the best avenue toward reaching that goal is through codifying the Fairness Doctrine, or whether it is best left to the "marketplace" is something I have yet to determine.

But I do know that there are abuses taking place out there. I would venture to guess nearly every member of this Committee has been at the "receiving end" of that abuse at one time or another, and I guess perhaps that is simply a fact of life in this job.

But it is frustrating. For example, just last week in my state a group ran very misleading television commercials which singled me out on the Contra issue we will be voting on later today. No one watching the advertisement could have known who was paying for it, despite a two-second disclaimer in very tiny letters which appeared at the very end. Viewers are left with one side of the issue, which was presented in a very misleading way—although it was crafted very carefully to just miss any Fairness Doctrine response or truth in advertising violation.

My point is that no matter how we craft legislation along these lines, someone or some group can always figure out a way to get around its intent—that being fundamental fairness.

What it boils down to is responsible broadcasting. The problem with out stations in South Dakota is that most of them only get one side of the story. They have no people or affiliates in Washington, therefore having no way of knowing how irresponsible some of these advertisements are. And there is no way to respond. One notable exception to this general rule in South Dakota is KELO–TV in Sioux Falls, our largest city. KELO is the only station which covers Washington news and, therefore, is the only one of our stations which consistently covers both sides of these controversial issues.

Many broadcasters have contacted me in opposition to codifying the Fairness Doctrine. They make legitimate points. But episodes like the one I experienced last week on the Contra-aid issue do give me pause for concern. There is no way to respond to one-sided commercials of this sort, unless an individual or competing organization buys time. This is impossible in many instances. It is for this very reason that we are seeing these kinds of advertisements targeted toward small market states like mine.

At any rate, I do not want to belabor the point. My purpose in drawing from this example is to point out part of what I see as the problem. Perhaps the problem I am raising is beyond the scope of legislative solutions. Of course, the most effective means of dealing with it is responsible broadcast journalism which gets both points of a controversial issue fairly and objectively aired. I am not certain that is happening with all these new special interest advertising campaigns. But I am not certain how we can deal with the problem. So, as I said, I am here today to listen and learn, and will be interested to hear what our witnesses have to say on the subject. Thank you.

Thank you very much, Mr. Chairman.

I was very intrigued with Mr. Ferris' statement that "implicit in public interest standard of the Communications Act is the fundamental obligation of broadcasters to provide the public with contrasting viewpoints on controversial issues of public importance". Let me say that I have come to agree with many of the things you have said.

I have been very concerned in the smaller markets, and it has not affected me personally, but the news reporters and people covering public affairs locally have, in some cases, I believe, been instructed to keep costs as low as possible.

Frequently there is absentee ownership of radio and television stations in areas where there is not heavy population, and as a result some television reporters and radio reporters cannot make long distance calls to keep costs down, are paid very low salaries, quite different from the Washington, DC, situation, and are really urged to sort of rip and read the AP wire or the UPI wire.

What this has done is invited outside groups to buy commercial time and present their case on some issue in a very misleading way. The only way to respond to this is for an opposing group to buy time. In some instances the news media feel they have no obligation to respond to these commercial ads, nor the ability nor the resources.

For example, on both sides of the current Contra-aid issue, in smaller television markets around the country, ads are being

bought by both sides. The ads are very misleading on both sides. But often, any given market will be targeted by only one side. This is especially true in the smaller markets with cheaper air time. The viewers are left with a very distorted view of the facts. And it is not just the Contra issue; it can be other issues, as well.

Many of these stations do no interviews in their news block on that issue, and they have no Washington or other national affiliate to get the other side of the story. Some managers tell me that the bottom line is their primary responsibility. They have to keep costs down.

And as a result, responsibility to viewers takes a back seat to business considerations. And I think that this is getting worse and worse over the years.

I think this is especially true out where you have absentee ownership; only one station in an area; instructions to the news room to keep costs down to the bare minimum; salaries of the news people are at the bottom; and so forth.

How do we deal with that situation, because I think without some kind of a fairness doctrine approval we just have whoever can buy the time.

Mr. FERRIS. I could not agree more. I think, Senator Pressler, that you have articulated really the present need for the Fairness Doctrine. The Fairness Doctrine has really two parts that people misunderstand. One, they have an obligation to cover issues of public concern in their community; and part two is, when you do it you do it in a balanced and fair way over the life of that particular controversy.

So there is an obligation on the part of those stations, even though they are absentee owned now, presently, because of the Fairness Doctrine, to cover issues. Now, I realize that if you eliminated the Fairness Doctrine and remove the obligation, you might not even have rip and read—you would have no obligation at all.

You might have the equivalent in many markets of what we see, the new phenomenon of the Home Shopping Network on television, where the frequency is used as nothing but an advertising medium. That might be the best that would evolve.

But I think it might be even worse than that. The contra aid advocacy ads that you have alluded to are a good example.—I think the greater danger is, without the Fairness Doctrine you could have the one side with the most money to purchase the ad and to dominate the dialog by the fact that they had a deep pocket.

One side could go into that community where there is no news operation and purchase time, in effect purchase the editorial discretion of that broadcast licensee under the first part of the present Fairness Doctrine to cover an issue of public importance and controversy and have no part two responsibility, no responsibility to the listeners of the station in that community to assure that the dialog is balanced and that the other side is presented.

So just the one with the deep pocket could dominate that dialog and overwhelm the dialog. That is what scares me without a Fairness Doctrine. The history of Government reaction to Guttenberg's contribution to speech is an interesting observation. It is a tremendous and flattering commentary to our lawmakers, because what they did in enacting the Fairness Doctrine was to put into law an

obligation on broadcasters for checks and balances, that the big and the powerful will not dominate the dialog in our society.

The big and the powerful are what we are worried about. The Government is big and powerful, and I worry about their domination of the dialog, any particular government who happens to be in power. The Fairness Doctrine prevents that, too.

And that is really the beauty of the Fairness Doctrine. It furthers First Amendment principles because it requires more information. Keep in mind that the only remedy under the Fairness Doctrine, if you go through the process, which is de minimis from the standpoint of triggering an obligation, the only remedy available to the Federal Communications Commission if they find a violation is: Go out and cover the story some more, more information; do not let it be one-sided, do not let it be out of balance.

It is a check on those that could dominate the dialog. I think it is a great commentary on one government's lawmakers, and I think it is needed now more than ever because those who are entering broadcasting because of changes in the ownership requirements and the capacity to buy and sell without retaining the license for a long period of time—do not necessarily have a tradition of broadcast journalism.

They are thinking, as your absentee owner did, of the bottom line. And I think the Fairness Doctrine is needed now more than ever.

Senator INOUYE. Senator Stevens.

Senator STEVENS. Thank you, Mr. Chairman.

Chairman Fowler, I am interested in the situation that we find ourselves in. As I understand the statement of the Commission that you have presented, you have deferred to Congress now to determine the future of the Fairness Doctrine, is that right?

Mr. FOWLER. We gave Congress a chance to examine the Fairness Doctrine, yes, sir, before acting on it ourselves.

Senator STEVENS. You do indicate that you do have the ability to make that decision yourself.

Mr. FOWLER. Yes, sir, I think we do, but we think and have thought that the first course would be to defer to the Congress for its consideration of that Doctrine.

Senator STEVENS. Now, in terms of the current situation then as far as broadcasters are concerned, would it be unfair to say that there is now a period of uncertainty about whether or not the Fairness Doctrine does apply to the broadcast media?

Mr. FOWLER. I do not think so, because I have said and we have stated that we will continue to enforce the Fairness Doctrine, Senator, until it is eliminated, either by agency action or Congressional action or court action.

Senator STEVENS. But it has been repeatedly upheld by court action.

Mr. FOWLER. Correct.

Senator STEVENS. Are there any cases on their way up to the Supreme Court that I do not know about?

Mr. FOWLER. There are cases now that are in the Court of Appeals which bring into play the question of whether or not the Fairness Doctrine is constitutional. In fact, the Court of Appeals

has just indicated that it is now prepared to hear arguments on that question.

Senator STEVENS. You talk about the chilling effect of the doctrine itself. I am worried about the chilling effect on the public of the uncertainty that is created by administrative denunciation of a policy that has been endorsed by both the legislative branch and by the Congress. Not that I necessarily disagree with you, but I just think we are in a real strange period here.

I have the feeling that small broadcasters in areas such as my friend from South Dakota and I represent, particularly new stations, must have a total feeling of uncertainty as to what law applies to them now.

Mr. FOWLER. Senator, I do not think that is the case. I understand your concern. Again, we have said we will continue to enforce it as we have in the past. In the meantime, however, I must observe that there is a far more serious harm that is visited on the American people, because we have absolutely documented that the way the Fairness Doctrine works, where the government comes in and looks at program content to see if someone has balanced or not balanced something, it actually keeps controversial issues off the air. And in our view it has been and continues to be that, just like the New York Times or the Washington Post or any newspaper you care to mention, we ought to be able to rely upon market forces in the case of a television newsroom or a radio station newsroom, because it operates identically.

Only the means of transmitting the information are different, and that distinction is an excuse to regulate broadcasters differently. But I do not believe it is a reason, particularly since we see that the Wall Street Journal, for example, and the New York Times today are transmitted by way of satellite, using public spectrum in order to reach their viewers around the country.

Senator STEVENS. I think we will have to cross that bridge one of these days, I agree with you on that. But getting back to the principal problem here, the Commission created the Fairness Doctrine in effect, did it not?

Mr. FOWLER. Yes, sir.

Senator STEVENS. Are you saying the Commission, which as I understand it is the Government in your last statement, is interfering with the media? You are saying that the Commission is unable to now carve out a different policy in its determination of individual cases that would reflect changes in the marketplace and the multiplicity of media?

Mr. FOWLER. No, indeed I am not. In fact, we have initiated a proceeding, Senator, to look at possible ways to enforce the Fairness Doctrine less restrictively or to administer it in a different way that might lessen the chilling effect. That is pursuant to a Congressional directive which we are following. We are obligated to file a report with you by September 30th of this year.

Senator STEVENS. That was what I remembered. There was a time frame. Can we expect that report within that time frame?

Mr. FOWLER. Yes, sir, indeed.

Senator STEVENS. Thank you very much.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you.

Senator Exon.

Senator EXON. Thank you, Mr. Chairman.

I would like to go back to—Chairman Ferris, when you were chairman of the FCC, how big a problem was the enforcement of the "Fairness Doctrine"? I guess I had the impression that, while it was your obligation to look at stations, radio and television, that were involved in this, it probably was not a major part of your operation, and that I thought that the threat of it being there and the feeling and the concern on the part of the operators that you might come in and look over their shoulder probably was the main reason for the success of the program at that time, if it was a success.

How much time did it take and how much did you, as chairman of the FCC, have your people go in and actually making checks?

Mr. FERRIS. It was no problem at all. As a matter of fact, in 1979 the Commission, while I was there, Senator, had the opportunity to have before it an examination of the Fairness Doctrine and made a fresh finding in 1979 that it had no chilling effect on broadcasters, that it had a salutary effect, really, on the broadcast dynamic.

And my predecessor back in 1974 had an even more exhaustive study of the Fairness Doctrine and they came to the same conclusion, that it had no chilling effect on broadcasters and still was considered part of the public trust obligations of broadcasters.

So I think it had no impact at all. And you have to keep in mind, Senator, how the complaints that come to the FCC. The process starts with the people in the community complaining to the station. Normally, the station will talk to the the person in the community who has the complaint.

Only if that dialog breaks down does a letter come to the FCC. And when the letter comes to the FCC at the staff level, the staff will look at it, and in 99.5 percent of the cases the staff makes a determination, without even contacting the broadcast licensee, that there is no basis for a fairness doctrine complaint and summarily dismisses it.

So then, only after that filtering process do they go to that one small part of one percent and say to the broadcast licensee: Hey, we have got this complaint; what are you going to do about it?

Senator EXON. So the bottom line is that the threat, the potential threat, was somewhat self-enforcing?

Mr. FERRIS. Absolutely.

Senator EXON. Did not this normally come up, though, during that period when the station was relicensed? Was it not looked at in more detail at that time?

Mr. FERRIS. No. As a matter of fact, the fairness complaints are not looked at de novo in connection with license renewal. They are looked at on an ad hoc basis based upon a complaint and disposition. It is only part of the renewal process as part of the overall review of the broadcasters' performance.

There have been proposals over time to review fairness obligations only at license renewal. They have never been adopted, and I think if that happened there would be even greater anxiety on the part of the broadcast community than exists today.

But the series of cases that were documented by the National Association of Broadcasters were about 45, 46 anecdotes of broadcast-

ers telling stories about how it had an effect on them personally. And to a great extent, many of those cases were based upon a misunderstanding of what the Fairness Doctrine required and therefore examples of walking away from a journalistic responsibility because we did not want to have trouble.

I think if you get a license you should assume those obligations.

Senator EXON. Chairman Fowler, you heard my question, you heard the response. I am wondering if your experience has been significantly different than that cited by former Chairman Ferris?

Mr. FOWLER. Yes, sir. I could not disagree more with his remarks.

First, we have had one station that was designated for hearing and ultimately lost its license, among other things, based upon a failure to adhere to the Fairness Doctrine. That was Reverend Carl McIntyre.

Fred Friendly documents how somebody in one of the Administrations in the sixties said, we have got to shut down these "right wing evangelicals," and we will use the Fairness Doctrine to do it, during the campaign period. That is an example of how Government can intrude to chill broadcasters and keep things from being said that the public has a right to hear.

So it is not correct to say that the Fairness Doctrine never comes up in the context of license renewal.

Second, the anecdotes that were put in the record numbered 75. They were from all kinds of different people, including some of the people who are proponents of the Fairness Doctrine, showing how they have been able to use the Fairness Doctrine, in effect, to shake down broadcasters, to intimidate them, and to make them not put something on the air that they wanted to put on the air because they would then have to come up with, for example, equivalent spots to tell the other side of the story or tell three sides of the story, and they were unwilling to do that.

Now, the net loser in all of that was the public, because the public never got the information that they would have gotten had they been able or had they chosen to cover that story.

Senator EXON. Even though only one side came out, you think that helps the public?

Mr. FOWLER. That is the point. Neither side came up, Senator. That is exactly the point, because they were browbeaten into believing they would become involved in a huge hassle with the Federal Communications Commission, the attendant legal fees, the attendant hours and the use of their personnel to document what they had done and not done as they got called on the carpet by the FCC. Therefore, they elected not to cover a particular controversial story that they wanted to cover.

But I go back to my basic point. Why? Why do we insist upon harnessing broadcasters with obligations that we do not harness on the print media? They operate identically. The newsrooms operate identically.

Decisions are made to cover certain stories. The stories are covered. The stories are then written up. The stories are then reported to the respective target audiences. The only difference is in the means of transmission.

We know that the print model has worked very well over 200 years in America, and I say it is time, particularly since we have documented evidence of the chilling effect of the so-called Fairness Doctrine, which is a government censorship doctrine, that the time has come to eliminate it. It has no place in a free society. I feel very strongly about that.

Senator EXON. Thank you, gentleman.

Thank you, Mr. Chairman.

Senator INOUYE. Thank you very much.

Senator Ford.

Senator FORD. Mr. Chairman, I was unavoidably delayed and I did not have an opportunity to listen to all of the statements.

But Chairman Fowler, when was this right wing evangelical closed down, and who had the authority to do that?

Mr. FOWLER. I will try to give you the date of the *Brandywine* case. I am told it was 1974.

Senator FORD. You were told it was 1974?

Mr. FOWLER. Excuse me, it was 1973. And it started in 1965, so they put him through approximately——

Senator FORD. Who are "they"?

Mr. FOWLER. The people who filed the complaint and the government put him through years of litigation. And in fact, what is ironic about this, this was a Philadelphia station that got into trouble precisely because it put all kinds of people on the air, extremists of the right, the left, and in the middle.

It was, I believe, a news talk station, and precisely because it was a voice that mirrored all kinds of viewpoints, including extreme viewpoints, that is precisely the reason that he got into problems and ultimately that he lost his license.

Senator FORD. How many like cases have there been since that time?

Mr. FOWLER. There have not been any where licenses have been lost. There have been numerous of cases that have been litigated.

The *NBC Pensions* case is an example in point, where a complaint was brought that ultimately wound up in the Court of Appeals, but it took several years and about $100,000 in legal fees before NBC was vindicated.

My question is, what happens the next time somebody comes to the news director of NBC and says, we would like to do something else that is controversial that deals with pensions, or something of a like nature? I think that the answer is going to be: Let us think about that.

That is why I believe in broadcasting today typically the very controversial discussions, particularly on the local level, are missing on television and radio, but they wind up in the local paper, because broadcasters are in some respects neutered.

Senator FORD. If you did not have the Fairness Doctrine, would it be much harder for someone to make a charge and take an individual to court than with the Fairness Doctrine?

Mr. FOWLER. Yes, sir. If you did not have a Fairness Doctrine, I believe that economic forces and marketplace considerations would result, as the man from Westinghouse indicated in response to questioning from Senator Packwood, they would continue to cover generally both sides of issues. And they would, I believe, tackle

more of the controversial subjects than they do now, because they are now putting their licenses in jeopardy when they elect to do so.

Senator FORD. Mr. Ferris, you have some rebuttal to that?

Mr. FERRIS. Well, the question that was asked about NBC, the *Pensions* case, that they would think about it and Chairman Fowler saying they might be inhibited the next time; without the Fairness Doctrine, they would not even have to think about it.

They would not even have to cover such a story. There would be no obligation to provide news and public affairs whatsoever. There would be no obligation on the part of licenses to have an informational aspect to their programming.

And I still insist that there has never been a case where fairness was the basis for denial of license renewal. I think that the *Brandywine* case was decided in the Court of Appeals on the basis of misrepresentations by the licensee to the FCC. It was not a fairness obligation.

The linkage of fairness enforcement and license renewal has never been a policy of the FCC—it certainly was not on my watch, and I do not think it has been on Chairman Fowler's watch, and I do not think it should be and has been on anyone's watch.

I think without fairness you would not have any of these obligations to cover any of these issues of public controversy, and I think broadcasters would be easily deterred from the controversial.

The only liability they have to contemplate is the fact that they might have to carry another program, that is all. They might have to do more informational programming. They might have to further First Amendment principles by informing the public in greater detail.

I think that is a very small price to pay for the public trust and the public interest obligation that was part of the original deal back in 1926, when the Federal Radio Commission was established and the licensing mechanism was set up in response to broadcasters who sought it.

Senator FORD. I have some concern, Chairman Ferris. You talk about the small communities. I think the professor brought that up a few moments ago, where they can just be dominant and that would be the only information you receive and that is all you would get.

And then you have also the other side, where they are so large that they can do whatever they want to. They are like the big gorilla, and David never has a chance because you cannot find a rock to put in his slingshot.

I am inclined to agree with you, Mr. Ferris, that the Fairness Doctrine has to be there. I do not know that it is such a deterrent to interesting documentaries and things of that nature, because we have all kinds of newspaper print about all the anguish going on behind the scenes before they put it in and they determine they are going to put it, and then they run ten series or 15 series of whatever it might be.

So I think the consideration of what they put on is one thing. I doubt seriously that it is a deterrent to getting out the news.

If I read the applications and what is put in them—and I will quit in just a minute, Mr. Chairman; I hear you clearing your throat. But I think that when the applications for renewal are car-

ried out, they swear to how well they have supported the community and brought all the information forward and that sort of thing.

It would be very difficult for me to see anything otherwise.

Thank you, sir.

Senator INOUYE. Senator Wilson.

Senator WILSON. Thank you, Mr. Chairman.

Mr. Goodgame, I am intrigued that the view that you have expressed seems to be at odds with the lead in the news release put out today on today's hearing by the National Association of Broadcasters, which says:

> Two broadcasters today told the Senate Communications Subcommittee that the Fairness Doctrine deters broadcasters from airing controversial issues and asked that it not be made into law.

I gather that you find no such discomfort with it, and it is interesting that, representing broadcasters, you do not. It is your testimony, then, that it does not interfere with your news editor giving adequate coverage and assigning reporters to cover what are in fact controversial issues, or issues that in the context of this inquiry turn out to be controversial?

Mr. GOODGAME. No, sir, I have no problem with that at all. I fully recognize the NAB's position. I certainly understand the need for the National Association of Broadcasters and the radio and television stations having a unified position on the issues.

It happens to be that we, my company and I, are at odds with this particular issue. I stated in my notes that never had that been a problem for our company.

I would further state that I have not been with Group W but for six years, and I have been with another company, a small broadcaster in small communities, who lives by the Fairness Doctrine, believed in the Fairness Doctrine, and applied its principles. And I do not think that we ever let that stand in our way of trying to do a good job of covering our community.

A broadcaster always has the right, I believe, to cover those issues that he deems important. And I also think that sometimes in that process there are certainly issues you walk away from, but I do not think the Fairness Doctrine is the reason you walk away from them.

If anything, if there is an issue that looks like it is that controversial, I think that most broadcasters that I know—and I think I know quite a few of them, certainly in the television business—would certainly not ignore that issue and certainly try to give it fair and equal treatment.

Senator WILSON Is there, Mr. Chairman, any statistical data available that shows how many complaints are received by stations and by the Commission that are really based on the Fairness Doctrine, as opposed to the kind of complaints you get from people who say you're not giving the coverage that the importance of this event deserves, and therefore the public is being denied knowledge of something significant in their community?

Is there any data——

Mr. FOWLER. We have data on the number of complaints we get on Fairness Doctrine matters. I do not have it with me. I would be happy to supply that.

Senator WILSON. I think that is an interesting point that Mr. Goodgame makes. It is the news editor's prerogative, within some limits, to decide what is newsworthy and what is going to be covered.

But I would think that there is an interesting and often fine line that would probably result in people bringing complaints about a lack of coverage, as opposed to unfair coverage based on the fact that an abuse of discretion has taken place in the decision not to cover an event.

I am particularly interested in that aspect of this problem. I am wondering what the experience of Group W has been, Mr. Goodgame, in dealing with that specific problem. Also, without more specific rules being provided by anyone, how are you guided? How do you make those decisions on the application of the doctrine?

Mr. GOODGAME. Well, as I stated earlier, the company has had a policy that basically followed the Fairness Doctrine precepts since 1947, I believe. That has been the stated policy, which was before the 1949 decision of the current Fairness Doctrine.

Basically speaking, having been the general manager in four television stations and serving in Group W for the last few years, I do not think that there is any issue that comes up in our communities that we serve of any importance that is not duly addressed by either an editorial committee or by the news department in and of itself or through a public affairs organization.

I recognize that there are many television stations, and I have run some, that are not in markets the size that we are in and that do not have those resources. But I can assure you, having been in marketplaces where the sole decision really rested singularly maybe between a news director and myself, that I would never see an opportunity for us to walk away from a controversial issue in our community, because to do so is to be in conflict with that license, regardless of the Fairness Doctrine or not.

And I do not mean by that to negate it. Someone may choose to jump on that, but I do not think it is jumpable. I think the Fairness Doctrine is one of the most important linchpins in owning a broadcast license.

Senator WILSON. Mr. Chairman, I think that is a very commendable attitude on the part of a broadcaster. My experience has been that the broadcaster's performance has been somewhat erratic, not with regard to your group, but just across the board.

There are some who have made the decision that they will not editorialize, and that is their right. But I think that there are some who carry that policy into the news room and, in fact, put out pretty pallid stuff.

Mr. Chairman, if that bell was for me, I was just wondering if we might get Chairman Fowler to make some response. I think I cut him off earlier.

Mr. FOWLER. Just one very quick comment. The fact that Westinghouse may not feel that they are chilled it seems to me is in one sense irrelevant. If there are a significant number of broadcasters, particularly smaller ones, not with deep pockets like Westinghouse, that fear the power of the government to come into their news room, to pull them up on the FCC carpet, and threaten to take their license away, as we documented in our 1985 Order, Sen-

ator, you have a clear chilling effect, which the Supreme Court is vitally interested in.

And I hope the day will come soon when the Court will revisit this matter. They have told us that they will revisit it if we can demonstrate that there is a chilling effect.

I think we have been able to show numerous instances in our 1985 comprehensive examination, some of which took place in your state of California, where broadcasters were absolutely intimidated and cowed by groups that threatened to take matters to the FCC if they did not get their way and if the broadcaster did not put things on the air or refuse to take something off that the broadcaster otherwise would put on the air.

And the American public, again, is the loser—I want to keep stressing that—in the way the Fairness Doctrine works. The American public is not getting all of the information on all of the issues that it could be getting, in our expertise and in our judgment, if we did not have that Fairness Doctrine.

And we have documented on the record, the chilling effect is there. I have not heard any reason why, I have not heard one yet, why you would treat broadcasters differently than people who use newspapers and ink.

Senator WILSON. Apart from the fact you are dealing with a different medium, I think that the point that you make about the blurring of that distinction is useful. I will be very interested to see that record, particularly the California part of it.

It may arouse some envy in me, Mr. Chairman, since I have been so unsuccessful in cowing broadcasters. But perhaps it would be instructive.

Thank you.

Senator INOUYE. Thank you.

Chairman Fowler, if we eliminated the Fairness Doctrine how would the FCC commence an investigation of a licensee who deliberately and intentionally broadcast only one viewpoint in its news and editorials?

For example, there was a time not too many years ago when there were broadcasters who would refuse to broadcast any news or editorials supporting civil rights, but only concentrated on news and editorials supporting segregation. Now, how would you go about investigating such a licensee? On what basis?

Mr. FOWLER. I would not. I would say that they are free under the First Amendment, that the very reason we have a First Amendment is to safeguard even offensive speech. In fact, the First Amendment really is not needed when things ε ' being said that everyone agrees with.

And I would say that there would be other voices that would state other sides of a particular issue. And if I may finish. And therefore, Senator, I would say ultimately that the people should be able to make their own judgments, and that they are not so ill-informed or unintelligent that they cannot decide, including the C-SPAN audience, whether or not on a given issue, even if a journalist is grossly unfair or says terribly offensive things, that they cannot determine for themselves what is good and true and what is false.

And that is the way the print model works. I would be troubled, as I am sure you would be, by the hypothetical that you posed in terms of the sheer offensiveness.

Senator INOUYE. It is not hypothetical. These are documented cases.

Mr. FOWLER. Yes, sir. But that is what the First Amendment is all about, the ability of people to say things that most people would violently disagree with. That is the essence of the First Amendment.

So back in the 1400's and 1500's when Galileo was preaching the heretical doctrine that the Earth was not the center of the universe, he challenged the Pope and the College of Cardinals, and he was imprisoned for that. My point is that is the reason we have the First Amendment, to safeguard unpopular, out of phase, or even visionary speech.

Senator INOUYE. Even when you have a community where the citizens are afraid to speak up, even if they are opposed to it or they could not even vote?

Mr. FOWLER. That has to do with our enforcement of the laws barring discrimination, and of course I would agree with you that we ought to enforce those laws to the hilt. I mean, I would not disagree with you at all.

Senator INOUYE. How many complaints have you had on fairness in the last two years?

Mr. FOWLER. Senator, I do not have those numbers in front of me, but I will be pleased to get them for you, sir.

[The following information was subsequently received for the record:]

FEDERAL COMMUNICATIONS COMMISSION,
Washington, DC.

Hon. DANIEL K. INOUYE.
Chairman, Subcommittee on Telecommunications,
United States Senate, Washington, DC.

DEAR CHAIRMAN INOUYE: You asked me in Wednesday's hearing on the Fairness Doctrine to provide information concerning the number and disposition of Fairness Doctrine complaints received by the Commission in recent years. During the past three fiscal years we have received the following number of complaints from the public regarding alleged Fairness Doctrine violations: 1984–6,760; 1985–7,296; and 1986–5,509. In each of these years, the Fairness-Political Programming Branch initiated approximately six written inquiries to stations which were targets of Fairness complaints. As a result of the material provided from these inquires, one adverse action was taken. That case *Meredith Corp.* v. *FCC*, is now on remand from the U.S. Court of Appeals for the D.C. Circuit.

It is important to recognize that, in accordance with policy established in 1974, an actionable Fairness Doctrine complaint must contain certain information, including an indication that the complaint has been filed directly with the station involved. Thus, although the Commission may not initiate the process, thousands of stations are contacted by members of the public each year concerning Fairness complaints.

Finally, we note that the number of complaints often varies widely from year-to-year. For example, in 1976, over 43,000 Fairness Doctrine complaints were received in commection with handgun legislation pending before Congress. Our experience is that annual variances are, in large part, attributable to compaigns generated by public interest and lobbying organizations.

We hope the above information is fully responsive to your request and will, of course, be glad to assist you further as necessary.

Sincerely,

MARK S. FOWLER, *Chairman.*

Senator INOUYE. I would like to get those numbers.

Can you also tell us how many cases in which you found that a licensee violated the Fairness Doctrine in the last three years?

Mr. FOWLER. We had one case in 1973 that was designated for hearing, among other grounds, on the allegation that it had violated the Fairness Doctrine. Chairman Ferris is correct in saying that it ultimately had its license revoked on a misrepresentation ground.

But the six years of hearings, the basis and the principal charge that commenced those hearings and put them into a hearing and initiated a gross chilling effect, not only on that broadcaster but other broadcasters, was an allegation of violating the Fairness Doctrine

Senator INOUYE. Mr. Goodgame, do you have a policy or procedure for responding to requests from members who wish to broadcast opposing viewpoints? What is your policy and procedure?

Mr. GOODGAME. Well, basically—of course, this can take several forms. We certainly do editorials and we have a policy that anyone who has an opposing view can approach the station and request to have a counter editorial, if you will, a rebuttal. And that of course takes one form.

Those are reviewed by the editorial board of the station. If they are felt to be valid, that time is provided.

Certainly as it pertains to the documentary, a news story, news series, whatever it might be, those are reviewed by the news department, brought to the general manager of the station, who may in turn consult with legal counsel just as to the position. And then the decision is made as to whether or not that complaint is valid and whether it should be responded to.

Senator INOUYE. How many complaints have been filed against you based on the Fairness Doctrine in the last two years?

Mr. GOODGAME. I do not really know of any based on the Fairness Doctrine. My counsel is right behind me.

There have been none in the last two years. I am not aware of any. Certainly I went into this job about eleven months ago, Senator. But in my two stations previous in Westinghouse there were none, and I am told there have been none in the last two years for the company itself.

[The following information was subsequently received for the record:]

WESTINGHOUSE BROADCASTING COMPANY, INC.,
New York, NY, April 16, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Senate Subcommittee on Communications,
United States Senate, Washington, DC.

DEAR SENATOR INOUYE: In reviewing the transcript of my testimony before your Subcommittee on March 18, 1987, I noted that you asked me, "How many complaints have been fil[illegible]gainst you based on the Fariness Doctrine in the past two years?" I responded i[illegible]ubstance that I was not aware of any. This was based on my eleven-month experience as President of the Television Station Group and my previous experience as the General Manager of two Group W stations.

Since my testimony I have had an opportunity to check and have found that for the past two years we have no record of any inquiry from the Federal Communications Commission based on a Fairness Doctrine complaint. Therefore, what I stated is essentially correct. I do wish to point out, however, that in the latter part of 1985 our station in Pittsburgh, KDKA-TV, received a fairness complaint from a local organization which apparently had been forwarded to the Commission. The station reviewed the complaint and found it to be without merit and so informed the com-

plaining party. The Commission did not direct an inquiry to the station concerning this complaint.

Our five television stations devote considerable time and resources to local news and public affairs. Furthemore, these stations editorialize on local issues. These types of programs create a great deal of interest. At times they generate letters and telephone calls from members of the public. Obviously, some of these communications voice disagreement with the station's presentation. Any reasonable complaint concerning the station's programming is addressed promptly at the local level by the management of the station. The handling of public criticism both constructive and otherwise is part of the business of broadcasting.

Again, I appreciate the opportunity to appear before your Subcommittee. I trust that this will give you a better understanding of my response to your question.

Respectfully,

THOMAS L. GOODGAME, *President.*

Senator INOUYE. Has it been expensive for your organization to uphold this policy and procedure that you have adopted?

Mr. GOODGAME. No, sir, it has not been expensive. And I guess again we deal with the relative size of the market. Our stations are in markets ranging from number five to number 21, but it has not been an expensive process, given that we have the public affairs people and the public service people on staff to handle that type of thing.

I would rush to add, however, that I did not have those services when I was in the fifty-third and fifty-fifth markets in the country, with me and the news director and the program manager who dealt with these situations, depending on where it lay.

And I do not think that it is an expensive process at all. Certainly if you get into a hearing, if you get into a situation where intensive amounts of research are involved, it can become that expensive process. If you go to the FCC, it is certainly going to become an expensive process, no matter who it is.

But I think if you acknowledge the fact that you have a license and you have that obligation, then it is a very small price to pay.

Senator INOUYE. Thank you very much.

Senator McCain.

Senator MCCAIN. Thank you, Mr. Chairman. I will try to be brief and I apologize for being late. There was a very important hearing.

Mr. Fowler, could not a case be made that the nature of television broadcasting has changed; that for a long period of time access to news and information was basically confined to three major sources and now we are veritably inundated with other sources. And would this not lead to mitigation of the Fairness Doctrine?

Is that an accurate assessment?

Mr. FOWLER. I think that is very accurate. For example, as of 1985, 97 percent of American households, Senator, had at least five television signals, and 71 percent had nine or more.

We have come a long way from the sixties and the seventies, when essentially there were three choices.

Senator MCCAIN. Could it be logical also to address this issue of fairness when a station is applying for relicensing and there is naturally a review of the way that they have handled this public trust, which indeed it is?

Mr. FOWLER. I think it might be administratively more efficient to do it that way, but I think that you are going to create a very long period of time where a chilling effect is visited on that broadcaster until that matter is resolved.

For example, the Congress has provided for a seven year term for radio licenses. Let us suppose that someone files a Fairness Doctrine complaint in the first year after the license has been renewed. What that means then is that matter would not be ultimately decided by the Commission for another six years, and I think that would have a very long and damaging chilling effect on the operations of that station.

Senator McCAIN. Well, would it not be one of the things you would look at anyway in relicensing? Would you not look at this to assess whether they handled the responsibility. They owe the public by virtue of being granted a broadcast license in a responsible fashion?

Mr. FOWLER. We would look now, as it stands, on each complaint as it is filed. We would rule on it at that time. We would not defer until the license came up for renewal.

Senator McCAIN. Can you give me a concrete example of where the Fairness Doctrine has worked or not worked?

Mr. FOWLER. I could give you an example here. Here is a coalition, a public interest group so-called, that describes its successful invocation of the Fairness Doctrine. It was an anti-smoking group and, in order to pressure broadcasters into refusing to sell advertising time to their opponents, they recounted that they "mailed preemptive letters to every local broadcast station remarking on the upcoming vote and asking to be notified as soon as the tobacco industry bought air time."

This was for a public ballot. "Ten Miami stations, seeking to avoid the group's predictable demands, simply refused to sell time to the industry front," that is the people who were taking the industry's viewpoint. And as a consequence, the public was denied any information on that issue as a result of the actions of that group.

Now, that is a clear example—and we can forget about the issue itself—of where something that would have been published, in effect, or broadcast was not. It was chilled, it was discouraged, by the threat of using or employing a government tool, a censorship tool really, to discourage them from putting it on the air.

And the public was the loser in that case.

We have about 75 anecdotal examples in the record that we compiled, Senator, and that was from a cross-section of broadcasters all over the country.

Senator McCAIN. Would any of the other witnesses care to counter that?

Mr. SHAYON. Chairman Fowler said 72 anecdotes. Would he tell us, please, the range of time represented by these anecdotes? Two years, five years, ten years, fifteen years?

Mr. FOWLER. It goes from roughly in the 1960's through to our most recent case where we imposed a penalty or sanction on the Meredith Company, which is now in the Court of Appeals. That was, I think, decided in either 1984 or 1985 by the FCC.

Mr. SHAYON. So you have from 1965——

Senator McCAIN. Sir, I must object. If you would, the job of the committee is to ask the questions.

Mr. SHAYON. I am sorry. I did not want to violate protocol. I just wanted to make a point.

Senator McCAIN. Thank you. Please go ahead and make a point. But I would appreciate it if you would not interrogate Mr. Fowler.

Mr. SHAYON. Oh, I must address the chair, right?

Senator McCAIN. Yes.

Mr. SHAYON. Thank you very much.

Senator McCAIN. Please go right ahead.

Mr. SHAYON. My point is that the anecdotes represent a small and very minute percentage of the cases that are possible in considering violations of the Fairness Doctrine. You have 26 years, you have 10,000 stations in this country. And if you weigh the small amount of cases that have come before the FCC, you see that it is utterly irrelevant.

Most stations can handle Fairness Doctrine complaints privately by discussing with their constituents what they want. And what is so terrible about putting a few more voices on the air? That is the trust to which they are committed by the First Amendment, the encouragement of controversy.

I do not see how they suffer horror stories of chilling or intimidation. They are supposed to fulfill the public trust. They are supposed to be proxies, fiduciaries, for the community at large.

Why do they always withdraw into their shells when somebody comes up with a request for air time? Why not meet it head-on as a good citizen would do?

Mr. FOWLER. Could I respond to that?

Senator McCAIN. Yes.

Mr. FOWLER. First of all, the fact that most broadcasters do attempt to comply with this doctrine is one of the reasons that you do not have as many complaints as you might think that one would have. But nevertheless, the chilling effect is there in their execution and adherence to the Fairness Doctrine. This is precisely the point.

When he talks about public trusteeship and fiduciary obligations, when you translate that into practice, what that really means is that the good old FCC, with five political appointees, makes judgments concerning content. It acts as an editor, and I think that that is unacceptable in a free society.

As the Supreme Court has said, editors are the people who should do the editing and not the Government. And we have a process unfortunately now, Senator, where the Government does the editing in the name of so-called fairness.

It has been my experience that the most dangerous times in our country, when we can lose our freedoms, are times when people advocate Government actions, particularly with respect to our rights under the Bill of Rights, in the name of good aims.

Senator McCAIN. Thank you very much, Mr. Chairman.

Senator INOUYE. Thank you very much.

Senator Packwood.

Senator PACKWOOD. Let me ask Dr. Smith a question. In the *TRAC* decision, the Telecommunications Research and Action Center decision, Judge Bork indicates that the Fairness Doctrine is not statutory. Do you agree with that?

Mr. SMITH. I think that whether or not the Fairness Doctrine is statutory is a very close question, Senator. I think if you examine the record and you look at the legislative history, you will see, and

I think Senator Proxmire would indicate, that the intention of the Congress was to codify the Fairness Doctrine.

What Judge Bork said in his decision was that in fact what happened was that the FCC was given primary jurisdiction, that they would rule on it first, and therefore what was codified was primary jurisdiction, not the law itself.

It is going to take a while for the court to untangle that as we move down the road. But I think what is interesting about the *TRAC* case is that it raises the whole question of whether the Fairness Doctrine as proposed in this legislation would apply to Teletext, and that I think is a crucial question, because there you have a crossover between media.

Senator PACKWOOD. Not only do you have a crossover of media, but I want to go back to Professor Shayon, if I might. Professor, you say in point two: "Scarcity of spectrum space is still an inescapable fact." Correct?

Mr. SHAYON. Correct.

Senator PACKWOOD. And it is on scarcity that the right of the Federal Government to impose the Fairness Doctrine is pinioned?

Mr. SHAYON. Right.

Senator PACKWOOD. Indeed, the New York Times and the Wall Street Journal do transmit electronically, correct?

Mr. SHAYON. Yes.

Senator PACKWOOD. And the satellite company is licensed?

Mr. SHAYON. Yes.

Senator PACKWOOD. And it sells space on the satellite?

Mr. SHAYON. Yes.

Senator PACKWOOD. Could you use the scarcity doctrine to require the New York Times and the Wall Street Journal to beam or not beam certain materials because they are using the spectrum?

Mr. SHAYON. Well, that is a ticklish point that the courts and the Congress and the people who study communications are wrestling with now. We are in a transitional period. It is a grey area.

Senator PACKWOOD. Do you think that you should be able to tell the Wall Street Journal and the New York Times, if they are using the spectrum, what they may and may not send?

Mr. SHAYON. I think that the spectrum is limited and if the big users shut out small users then the Government should act to make fairness the ruling guideline.

Senator PACKWOOD. Or any other content doctrines that they choose to use premised on scarcity?

Mr. SHAYON. I do not accept that without knowing what the other guidelines are.

Senator PACKWOOD. All right, let us stick to Fairness then. You think that we could tell the New York Times and the Wall Street Journal what to transmit up to their satellite and what to transmit down using the Fairness Doctrine?

Mr. SHAYON. If they became electronic broadcasters in the same way——

Senator PACKWOOD. No, not electronic broadcasters. They are using the scarce spectrum to send out their information to their different printing plants and different people who buy their services.

Mr. SHAYON. Right.

Senator PACKWOOD. They have not yet broadcast it to the general public, but they are using a scarce spectrum.

Mr. SHAYON. Right.

Senator PACKWOOD. They send out a story on the Contras. Could a group that does not agree with them demand that they also send out a different version of the story as the objecting group wants it sent out?

Mr. SHAYON. Well, they might demand it, but there would be no Government sanction behind them to compel it.

Senator PACKWOOD. No, there is none now. But could there be under the Fairness Doctrine with the Times and the Wall Street Journal using the spectrum?

Mr. SHAYON. I think I would be willing to examine that, just as I would be willing to examine the problem of newspapers carrying replies following the *Tornillo* decision.

Senator PACKWOOD. You mean you might compel them to carry it?

Mr. SHAYON. There might be a case to be made for it. The government is not only a repressive factor. It represents the total community and sometimes can be used constructively.

Senator PACKWOOD. You have got a lot more faith and trust than I do. On balance, I would rather trust the newspapers and the journalists and everybody else to decide what to put in than to have the Government say: New York Times, Wall Street Journal, NBC, if you are going to use the spectrum, you put out both sides of the Contra story, you put out both sides of any kind of story, as we see it.

Mr. SHAYON. Well, may I say that when the Founding Fathers wrote the Constitution they were conscious of only one repressive force. That was the Government. The King of England had repressed them and they wanted to stop that in their new republic.

Had the Founding Fathers been aware of the emergence of huge corporate establishments with power over the communications of this country, I think they would have taken a different view of that also.

Senator PACKWOOD. Let me ask Dr. Smith that. What do you think? Your foundation has done research on this very point.

What would the founders do today if they were faced with the electronic spectrum?

Mr. SMITH. Oh, I think that there is no question but that the founders would have extended First Amendment freedom to all forms of expression. They did to all the forms of expression that were available at the time.

There were only a handful of newspapers that were available. They were highly partisan. They did not present two sides of the issue. They covered what they wanted to cover. Oftentimes it was just advertising on the front page and they got to the news on the second page.

And all of that was protected. I cannot imagine, if they protected that—and if you look at some of the papers back there in 1791—that they would not have protected the broadcast outlets that exist today.

One other thing that I want to say is that there are a good many broadcast outlets that are not part of corporate conglomerates that he was talking about.

Senator PACKWOOD. Let me ask you another question on academics, because we have two academics here today. You have spoken on campuses. You are familiar with the academic and journalistic professional groups.

What are the views of the various groups that you know of that would be called professional journalism groups?

Mr. SMITH. Well, the repeal of the Fairness Doctrine has been called for by Sigma Delta Chi, the society of professional journalists. The AEJMC, which is the American Association of Journalists who work from the professor level up on to the dean's level up—those are the two most credible——

Senator PACKWOOD. You mean that's the association of journalism teachers?

Mr. SMITH. That is right.

Senator PACKWOOD. Thank you, Mr. Chairman.

Senator INOUYE. Senator Pressler?

Senator PRESSLER. I would like to address the question I had earlier to Mr. Fowler and Mr. Smith.

In these small markets that I have described what are we to do when someone comes in and buys misleading ads. I'm talking about some group that—which present a very distorted view of one side of an issue, if they're disclaimered at all it's in a flash of a minute and nobody really knows what they are or where the ad is coming from.

The only access other groups or individuals have on some of these issues is through buying response time. The journalists really are not allowed or able to function as journalists.

And some of these are highly profitable stations. But the news rooms are told to cut costs. They're paid low salaries. They have old equipment. They don't have a Washington bureau, and really in terms of a response, there isn't any.

You can say, the other side can buy time. But the other side doesn't even know about it, or maybe doesn't have enough money or isn't organized to buy time. And nobody really knows, the ads are presented in such a way that they appear almost as news.

How do you deal with this without a fairness doctrine?

Mr. FOWLER. I think what you do is rely on the fact that we have an information rich—society. And there may be——

Senator PRESSLER. Information rich?

Mr. FOWLER. Information—rich, yes.

Senator PRESSLER. In some of these rural, smaller cities?

Mr. FOWLER. Absolutely. There are over 10,000 daily, weekly, and monthly periodicals in the United States. 10,000, that's an amazing number, just in the print area.

And what we, I think, would say is, when you have full First Amendment rights for broadcasters, as print journalists now enjoy, that there may be times when people are unfair.

That's the essence of the free press. And Dr. Smith talked about what the framers were confronted with, and the fact that they had exactly eight weekly newspapers, I believe, at that time.

Senator PRESSLER. No, I'm not talking about the print media. I am talking about broadcasters in a small market—often with a local monoply. In the big markets there may be competing broadcasters. But I am talking about very small markets.

There are not alternative. There is only the local radio station or, the local TV station. There might be a weekly paper. But there are not equally effective alternative sources of information in some of these local markets that can compare to the TV station. And a lot of them aren't covering the issue in their news. Now they might be doing it in the big cities with several stations, but that is not what I'm talking about.

Mr. FOWLER. There's a newspaper, of course. And the newspaper is free, now, under the First Amendment to write freely without any government intervention.

Senator PRESSLER. But in this current——

Mr. FOWLER. There are generally radio stations in those markets. And most small communities have a significant number of video signals by virtue of having cable operating in their area.

So even as to the electronic means of gathering and disseminating news, in most markets, and I indicated the statistic that 90 percent of the households——

Senator PRESSLER. So in other words, you would have to depend on media other than radio or TV?

Mr. FOWLER. No, I'm saying that, first of all, I think that most—because of economic forces—most broadcasters with full First Amendment rights would cover all significant sides of controversial issues, just as newspapers have for 200 years.

Senator PRESSLER. But that's not happening. I can take you to three or four markets that I know of that they're—the newspeople are just told not to touch anything controversial.

Mr. FOWLER. That's precisely the point, though. The fact that we have a Fairness Doctrine, Senator, is the reason why broadcasters are frightened to death to tackle controversial issues.

Senator PRESSLER. I don't think that that's true at all. My point is that they do not touch anything controversial when one side is paying for commercial airtime. It is not because they are afraid of Fairness Doctrine requirements; it is because some of them do not spend the money to report on both sides of an issue. I think that without a Fairness Doctrine there would be even less coverage of controversial issues.

I'm not commenting on the big markets. I don't know about that. But I can assure you that in some of the smaller markets there are not alternative voices as effective as television and radio.

And you can say that there are hundreds of publications. In a lot of places there are not. In a lot of places people really depend on radio and TV to get the news, and especially TV.

And there are no alternatives when a third party comes in and buys up a bunch of time.

What's your solution to that?

Mr. FOWLER. My solution is to say that not every market has as many outlets as other markets. Very small, rural communities, because of the economics, will have, obviously, fewer voices. And that means that there may be occasions when an issue is not being covered in your eyes in a way that's fair and balanced.

But I think over the long term, even in these smaller communities, there are enough outlets, both radio and television, plus cable, plus other forums, such as town meetings, and the fact that people talk over the backyard fence in small communities about issues confronting very small communities.

Senator PRESSLER. Well, let's take Senator Inouye's example of an issue about which people in the community are afraid to speak up, as was the case during the civil rights era. And let's say it's a rural small town area where somebody might have a story.

There are not other voices able to come forth unless there's a Fairness Doctrine to provide some kind of forum on the television station—and the television station sometimes is the dominant force. I don't feel that——

Mr. FOWLER. I just don't think that the Fairness Doctrine is a solution. Because in the example that the Senator cited, which I believe relates to Mississippi and a television station there, that was done at precisely the time that we had the Fairness Doctrine in effect, and it was being stringently administered and enforced by the FCC.

So I don't think that that is the answer. I think the answer is a free press.

Senator PRESSLER. Well, the Fairness Doctrine, as it's intended to function, would solve the problem.

My concern is that from what I've seen in some of these highly profitable stations, they are making a problem for themselves in the sense that they don't allow their people to function as journalism because they're so bottom line oriented.

There are not other voices. And people come in and buy up time, or groups do, and it presents a very misleading view of the issue. There's no way to get the other voices on.

Mr. FOWLER. Well, if you think that newspapers don't work, and would work better——

Senator PRESSLER. No, I didn't say that. Let's stick with the TV station. Let's stick with the TV station. A weekly newspaper cannot compete with that. How do you get the other voices on the TV station?

Mr. FOWLER. I don't think that in an environment where you have a free press, that the Government should force people to be put on the air.

Senator PRESSLER. I didn't say forcing it. But how would you get the other voices out? How would you recommend doing it on the TV station?

Mr. FOWLER. I wouldn't recommend doing it. I would leave it to the editor's discretion to determine what goes on and when and how.

Senator PRESSLER. All right, but what if the other side is never presented?

Mr. FOWLER. I can't conceive of any issue, whether it's on a local basis, a regional or a national basis, that has not been covered in the print media, even in small communities, on both sides——

Senator PRESSLER. But you keep resorting to another medium. Doesn't television have some responsibility to cover both sides?

You keep saying if television is unfair, it's up to the print media to even it out. But what about the TV station?

Mr. FOWLER. What I'm trying to say is, if you eliminated the Fairness Doctrine as to broadcasters, I think you would have more robust discussion, more issues being covered, not less. That's all I'm saying.

Senator PRESSLER. Well, I can assure you, there are many markets where it's open to groups coming in and buying time on both sides, and usually only one side does. They're not identified and they often appear as news broadcasts. The other side is not being presented on TV.

Now you can say that in the local weekly newspapers it's being presented. It might be, and it might not be. But television has some responsibility. They occupy the airwaves.

Mr. FOWLER. Well, I guess we have a fundamental disagreement. To say they occupy the airwaves in my mind is really not a reason to have the Government intrude on how journalists operate and how editors edit.

It's an excuse, I think, but it is not a reason.

Senator PRESSLER. Well, none of us like Government intrusion. But what is your solution?

Mr. FOWLER. My solution is to simply rely on the First Amendment and the ability of people in this country to be able to make judgments after looking at various sources of information that are disseminated to them, whether they are print or electronic, and let them, in their infinite wisdom and with their intelligence, make up their minds and decide what's true and what's false.

Senator PRESSLER. I would agree with you in a big market where there are lots of different viewpoints, perhaps, but I can assure you there are a growing number of markets in this country where on local issues in particular, the other side is not presented.

Senator INOUYE. Thank you very much.

It always pleases me to have on the witness panel a constituent who travels many thousands of miles to share his words of wisdom.

Mr. Elkins, have you ever had a complaint filed against you?

Mr. ELKINS. I've had letters written, because I receive copies of them. Apparently they never found any support at the Commission level, because I've never had the commission contact me.

However, I might add that we—because I function in small markets—and incidentally, it's been fascinating listening to these learned gentlemen discussing what it's like in small markets—we try to diffuse fairness complaints when they come to the station immediately by just putting the person on the air, and that gets rid of him.

And we put him on the air whether it's frivolous or not. And in that respect, the Fairness Doctrine does serve as a substitute for our own editorial judgment. It intrudes on our editorial—on our newsroom.

Senator INOUYE. Do you feel that this intrusion is not in the public interest?

Mr. ELKINS. I feel that we would be able more efficiently to run a newsroom if we did not have that specter hanging over our shoulder all the time.

I feel that you do us a disservice by not trusting us to be able to make news judgments the same way that the people at the Maui News do.

Senator INOUYE. Is that the experience that other broadcasters find in Hawaii?

Mr. ELKINS. I believe so.

Senator INOUYE. They feel threatened and intimidated?

Mr. ELKINS. I believe you'll find that there are only two of us out of almost 60 stations, radio and television, who editorialize regularly, myself and Lawrence Burger at KHVH.

Senator INOUYE. Don't you consider these talk shows to be in the same category? There seems to be a proliferation of these talk shows.

Mr. ELKINS. KGU is doing talk radio. I don't know of any others. There's a distinction between talk radio and a station editorial or commentary; in that that represents the position of the station management or licensee.

Senator INOUYE. And it's your contention that, were it not for the Doctrine, all of the stations would be having editorials?

Mr. ELKINS. I think a great deal more would.

Senator INOUYE. I think most of the stations would avoid getting involved in controversy. They'd just like to put on country and western music, or soft music, or whatever it is.

Don't you agree?

Mr. ELKINS. I've found controversy to be very good business.

Senator INOUYE. During your time, were you involved in any situation where a licensee was denied his license because of a fairness complaint?

Mr. FERRIS. None. And I don't believe in the history of the FCC any licensee has ever lost their license because of a fairness complaint, Mr. Chairman.

Senator INOUYE. Throughout this day I've heard the word, scarcity in the spectrum. How scarce is it?

Mr. FERRIS. Well, I think it's not scarce if you have a couple of hundred million dollars and you wanted to buy one. But it is scarce if you just want to be a speaker in the electronic medium.

If you want to be a television broadcaster in a relatively large market, you can't get a property. There are more people that would like to be broadcasters than there are frequencies to permit them or to license them to be broadcasters.

I think that's the basic quid pro quo that took place back in the beginning when everyone was being a broadcaster, and everyone was putting up a transmitter, and everyone was interfering with everyone else, and you had nothing but chaos.

It's the order that came from licensing, and the quid pro quo was, you get the license, you serve the public interest, and the fairness doctrine is the body and soul of the public interest. Without it, there is none.

Licensing would be a sham. Public trust responsibilities would be a sham. I don't think the American public would accept the fact that there is a public trust concept for licensees of broadcast properties, if there are no substantive obligations that go with them.

I think that's exactly what it would be like if the Fairness Doctrine were eliminated, Mr. Chairman.

Senator INOUYE. Thank you. Senator McCain?

Senator MCCAIN. No questions.

Senator INOUYE. Senator Packwood?

Senator PACKWOOD. You and I have debated this before different groups, Charlie. I think the public interest is served by having no Fairness Doctrine. You think it's served by Fairness.

We're both talking about public interest. We just have a different idea of what it is.

Do we both agree, however, that the right to impose the Doctrine, if you do impose it, is based on scarcity? A court would probably not sustain it if there were no scarcity?

Mr. FERRIS. Scarcity in the sense that——

Senator PACKWOOD. Everyone can't have a station? Everyone can't use a part of the spectrum?

Mr. FERRIS. Precisely.

Senator PACKWOOD. Let me ask you the same question that I asked the good dean.

Could you impose the Fairness Doctrine on the Times and Wall Street Journal because they are using the scarce spectrum to transmit new signals to a satellite?

Mr. FERRIS. No.

Senator PACKWOOD. Why?

Mr. FERRIS. I disagree with that premise. I think the very fact that something—it would be like any other medium that used the telephone—a common carrier.

Senator PACKWOOD. The telephone is a wire.

Mr. FERRIS. But the method of transmitting the Wall Street Journal to be printed in various parts of the country, should not determine what First Amendment treatment that media gets.

Historically, First Amendment rights—and broadcasters have tremendous First Amendment rights—have been defined differently for different media by the court over the years. There's a difference between a pamphleteer, a difference between the person in a sound truck, the difference between the person on a soapbox, and a radio and TV broadcaster.

Senator PACKWOOD. Let me use a different analogy then. NBC is sending its signal from New York up to a satellite to be received by a station in Portland.

Could you impose the Fairness Doctrine on their signal?

Mr. FERRIS. No. They are not yet broadcasting.

Senator PACKWOOD. Why?

Mr. FERRIS. Because I think——

Senator PACKWOOD. They are now a broadcaster.

Mr. FERRIS. Not yet the obligations of broadcasters arise when they broadcast to the public. And it is critical to emphasize that, the person that gets the license, assumes the obligations that go with that license.

And the character of the medium of broadcasting arises from the fact that it intrudes broadly at the retail level.

Senator PACKWOOD. It is not the use of the spectrum so much as the retail level?

Mr. FERRIS. No, it's a combination of both of them. It's the use of the spectrum at the retail level. Broadcast properties are most distinctive. Television is the most intrusive, the most pervasive, the most insinuating and the most powerful medium. It requires no active participation on the part of the individual to be programmed.

Senator PACKWOOD. You've got the satellite up in the sky.

Mr. FERRIS. Yes.

Senator PACKWOOD. Everybody can't have a satellite?

Mr. FERRIS. That's correct.

Senator PACKWOOD. And everybody can't buy one of the transponders on the satellite because there are only so many of them.

When the FCC grants a satellite license, the FCC could not say to the licensee: you will not lease a transponder to anyone unless they agree to comply with the Fairness Doctrine. You say you couldn't do that?

Mr. FERRIS. I say the FCC couldn't do that. The Congress could but it would be foolish!

Senator PACKWOOD. So it's not the use of the spectrum that's the key then, because they're using the spectrum.

Mr. FERRIS. It's not the mere use of the spectrum that triggers Fairness. It's a condition of the license to broadcast that does, getting a license for the spectrum and using the spectrum are two different things.

Senator PACKWOOD. You're saying, the use of the spectrum when you broadcast to the retail public is one thing. When you broadcast from your own news desk to your satellite printing facility someplace else, that's a different thing?

Mr. FERRIS. I say it's the license you get to broadcast is what triggers the Fairness Doctrine. Senator, it's an anti-censorship device that accompanies the broadcast license.

Censorship can come from other than the Government. Censorship can come from someone licensed from the Government. And what the Fairness Doctrine says, if you get a license, you cannot censor out other viewpoints in that community.

Senator PACKWOOD. As Chairman Fowler indicates, I suppose any newspaper that prints its viewpoint is guilty of censorship if they do not print the other side's viewpoint?

Mr. FERRIS. Newspapers can be as biased as they wish. And that's their right because they are not licensed. But that's the difference in the medium.

You look at the Roper studies, the fact that 65 percent of the American public get almost all of their news from the electronic media; 50 percent get all of it from the electronic media; and I think you take, in combination with that, the very fact that the American public feels that what they get from the electronic media, by a 2 to 1 basis, is more credible than what they get from the print media.

I think that's attributed greatly to the Fairness Doctrine, and how broadcasters actually fulfill their responsibility that gives that perception of balance in the news they get from the electronic media.

Senator PACKWOOD. Chairman Fowler.

Mr. FOWLER. If that's a fact, and I'm not sure those numbers are exactly correct, this is basis for the argument that the more powerful or pervasive the medium is, the more it needs to be regulated.

I think it's just exactly the opposite, Senator. If that's the case, if people rely more on the electronic press than the printed press, that is another powerful reason, I think, that the Government

should have no part in what is broadcast, in determining what's edited, what goes on the air, what doesn't go on the air.

Mr. FERRIS. I don't think they do. The example, in Chairman Fowler opening statement where he linked section 315, the equal opportunities, the so-called equal time provisions is most appropriate. Certainly every Senator in the United States Senate knows section 315 better and more sensitively than I.

But if one falls, the other falls. And If there isn't a different character between the two media—television and newspapers—how many men and women that run for political office, for the United States Senate would be willing to get rid of the fairness doctrine and section 315, and say, I will buy newspaper ads and forget television?

They wouldn't volunteer to do it because they are aware of their different character.

Senator PACKWOOD. You would impose this on cable companies, wouldn't you, even when they don't use the spectrum at all?

Mr. FERRIS. Cable companies, it is a different matter.

Senator PACKWOOD. It doens't make any difference to the person looking at their set.

Mr. FERRIS. Well, I think—I imagine on a cable system that rebroadcasts broadcast signals, they should definitely have an obligation.

They don't have the same obligation that flows from being given a valuable property, that is, a license, by the Federal Government and with it have a public trust responsibility.

I think Congress might be able to structure a similiar obligation on cable companies who receive the compulsory license under cable. That a license could trigger the same quid pro quo with respect to the fairness obligation.

Senator PACKWOOD. What's a compulsory license?

Mr. FERRIS. Well, a compulsory license permits cable companies to carry broadcast——

Senator PRESSLER. You mean, must carry?

Mr. FERRIS. No, it's the permission to carry a distant broadcast signal. You don't have to get the permission of the broadcaster to carry that. And you pay some tribute to the copyright royalty tribunal, which is ultimately distributed to programmers. You don't have to go through the transactional costs of getting permission.

Senator PACKWOOD. Charlie, I'm curious now. To you there is no rational way that you would say we have reached a practical point beyond which there is no longer scarcity? I remember—what was his name, Chairman Fowler, Powers your chief scientist, is he still there?

Mr. FOWLER. No, sir, but his figures are still there.

Senator PACKWOOD. He was there for 20 years. He came and testified. He was the chief scientist at the FCC. He was a career person.

And I'm quoting what he said. "There is no inherent shortage of spectrum capacity from a technological point of view."

He said, we could take one UHF frequency in Washington, and we could have 95 to 100 additional radio stations in Washington.

I remember saying to Mr. Powers that the market would not support that many more stations. He said, that wasn't the question.

How many could you have? My gosh, Charlie, if you have, 15, 20, 25, 30, 35 stations, surely you don't think they're all of the same mind, that they're all going to broadcast the same editorial viewpoint, that the public is going to lack for access to different voices with that many stations available.

Mr. FERRIS. No, but it is the Government that decides to have 35, or to have 95. In any case I imagine each of us has developed habits that we listen to three or four stations, even though there are probably many more in the spectrum.

We develop habits there. But once we have the habit, we're captured to a great extent. It's pervasive. It insinuates into our daily lives. And it provides us with our information.

All I'm saying is, it has a different character as a medium, which triggers different First Amendment considerations.

And we've talked about First Amendment considerations here of broadcasters. The Supreme Court did say that the paramount interest of First Amendment rights and the balance in broadcast properties is the First Amendment rights of the listeners.

We haven't talked about them. And that's exactly what the Fairness Doctrine talks about, their interest, the rights to be informed in a balanced and fair way is really the paramount right, not the right of the editor, who is the licensee, or the right of the speaker.

Senator PACKWOOD. Mr. Chairman, I have a lot of other questions. But I wonder if I might ask unanimous consent to submit them to the witnesses and have them appear at this place in the record when I get the answers back.

Senator INOUYE. Without objection.

Senator PACKWOOD. You make somebody who listens to the radio sound like a narcotic junkie. Once you're hooked on this station, that's it for the rest of your life. You're never going to get off it.

I've been in this town 18 years, and I have not listened to the same station all that time. I go from WMZQ to WGAY to the classical music stations.

And if I get tired of that announcer or that station, I switch to another one.

Mr. FERRIS. Well, I do too. I said we all have four or five.

Senator PACKWOOD. I'm amazed at the breadth of your curiosity and interest.

I even sit there with that little funny button on the radio in the car that makes it go from station to station and push it just to see what different stations are doing during the day. If I get to one that sounds interesting, I stop and listen.

Mr. FERRIS. Tom just mentioned to me that the surveys that they've done demonstrate that the average is about 2½ stations. That's the allegiance that the American public has.

Senator PACKWOOD. And they stick with those, year in and year out?

Mr. FERRIS. They stick with those.

Senator PACKWOOD. They listen to it first when they're 15 and they listen to it when they're 40?

Mr. FERRIS. They might have a different 2½ as they move through life.

Mr. FOWLER. That's not correct at all. It's very volatile. People switch all the time. That's documented.

Senator PACKWOOD. Again, I think you wanted to respond, Mr. Elkins.

Mr. ELKINS. I just said while Chairman Ferris was speaking that I wish that was true, that no one ever switches from one station to another.

But the fact is, they do. I think the 2½ station figure comes from an isolated rating period or a sweep, which may be a week or two weeks. Those are the periods during which those figures are compiled.

Part of the figures that the rating companies try to put together are, how many stations does the average person listen to? And it doesn't vary much with market size.

You can have 10 stations available to you, or 20 or 30 or 50, and the average person listens to between two and three, because there's an information overload out there today, and there's more information available to us than anybody can possibly assimilate.

So you narrow down your choices. But the change does take place over time. Ratings do fluctuate. Stations go from low to high and high to low.

So there is an audience shift always in effect.

Senator PACKWOOD. Thank you very much, Mr. Chairman. I will submit the rest of my questions, and I appreciate your letting me put them in the record.

Senator INOUYE. Professor Shayon and Dean Fisher, in 1984 a study was conducted by the National Broadcast Editorial Association, and that study indicated that the two greatest reasons for not airing editorials was the time and money it took, and the perceived lack of interest.

Is that about right?

Mr. FISHER. That is about right, Senator. An editorial, to be meaningful, needs to take three or four minutes to unfold. To hold an audience on one topic for that long a time suggests that you are going to lose most of that audience.

I was interested in Chairman Fowler's comparison of what happens in a newsroom and in a broadcaster. I agree that a reporter goes out on assignment, gets the story, and comes back in. In that sense, it's quite similar.

But he didn't carry it far enough. When that story appears in the newspaper, supposing it's an important story about some financial aspect of city hall, and it runs 750 words. And when it appears in the paper, the paper then is given to a readership survey, as my newspapers were frequently, and we find that of a 100 readers, only 30 of them read that particular article.

That means that two-thirds of the audience was not interested in that story, even though we printed a column and a half of news on it.

Now, if that were running on a radio station or a broadcast station, first of all, they wouldn't have 750 words, but what they did have would be of interest to only one-third of their audience.

And if you are broadcasting to an audience two-thirds of which are not interested in what you're broadcasting, you can almost hear the click-click-click of the dial switching.

There is no selectivity in what a broadcast audience reads. The answer to that is to, first of all, carry articles that have very basic

human interest elements and avoid the serious contextual article, but also, to keep it short.

We have found that almost anyone will listen to anything for 20 seconds.

So you've got only one in three of your audience listening to that. But if you change it in 20 seconds, you change it before they can change the dial.

You program news programs for the person who is not interested in what you are broadcasting at the moment, but he lives in eternal expectation that the next article will be something that he wants to hear.

That's true. And of course to require that they give a substantive program, story, both sides, is a real danger to the listenership.

That's the real reason why broadcasters don't like to get mixed up with too controversial and substantive issues of the day.

Senator INOUYE. It's not the chilling effect of the doctrine?

Mr. FISHER. Of course not. It's the chilling effect of those click-click-clicks of the dial.

Mr. SPAIN. Senator, may I respond to that?

Senator INOUYE. Yes, sir.

Mr. SPAIN. As one of the only ones on the panel who works in an electronic newsroom each day, I find that statement outrageous.

There seems to be an assumption that those of us who went to journalism school and graduated and went into broadcasting are somehow less dedicated than those of us who finished journalism and went into newspapers.

Those of us who practice our trade behind the cameras and with microphones are just as dedicated to the same ideals as those who chose to put out a newspaper each day.

For this testimony to suggest less is simply not a reflection of what we do everyday.

We put together a newscast everyday with the same ideals, the same thoughts, as those people who put out the newspapers each day.

It is true that we have time restraints, but in my experience as a news director for 20 years in television, I have never seen any evidence to support the statements just made.

In fact, there is a great deal of research to suggest just the opposite. Television has often been accused of covering the controversial.

We often do find ourselves in situations where there are time restraints.

But to suggest that we are somehow less perfect and less dedicated to those same journalistic ideals than our counterparts on the news side is simply not true.

Senator INOUYE. As we say in the profession, you just had the last word.

We will have to stop this most enlightening debate, because we're voting now on the Contras. That's the big issue of the day.

So I'd like to thank all of you once again. It's been most helpful to the committee.

The Committee will stand in recess. However, the record will be open to receive any additional views that you may wish to submit.

And next Tuesday morning, the Committee will meet to mark up this measure.

So I thank you all once again. The Committee stands in recess.

[Whereupon, at 4:03 p.m. the subcommittee adjourned.]

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

STATEMENT OF HON. WILLIAM PROXMIRE, U.S. SENATOR FROM WISCONSIN

Today's hearing deals with legislation to codify the Fairness Doctrine. I favor repeal, not codification.

In 1975, and then again in each subsequent Congress thereafter, I have introduced legislation—known as the First Amendment Clarification Act—that will give the people of the United States increased First Amendment benefits by abolishing the Fairness Doctrine.

In the most recent Roper Poll released by the Television Information Office, 64 percent of the respondents said their main source of news was television while 14 percent cited radio. Clearly, television and radio are the dominant suppliers of news for the American people. Yet, because of the Fairness Doctrine and other governmental controls, broadcasters are second-class citizens when it comes to First Amendment rights.

The Fairness Doctrine requires that broadcasters afford reasonable opportunities for the presentation of contrasting viewpoints on controversial issues of public importance. It does not call for each viewpoint to receive the same amount of air time. Nor does the Fairness Doctrine require that the other viewpoint be given in the same program.

That sounds fine. But the Fairness Doctrine violates the First Amendment. A segment of the free press is being regulated by the government.

This hearing is not the appropriate forum for a full description and analysis of the First Amendment Clarification Act. But I would like to state briefly why abolishing the Fairness Doctrine—the objective of my bill—is necessary, and, indeed crucial.

First, the Fairness Doctrine is governmental control over a part of the free press and, therefore, unconstitutional. It violates the First Amendment's guarantee of freedom of the press.

Second, the kind of governmental regulation embodied in the Fairness Doctrine is unnecessary. Newspapers, operating without government control, have improved vastly in fairness, objectivity, accuracy, and relevance over the years. Broadcasters deserve that same opportunity to be free.

Third, denying broadcasters their First Amendment rights is self-defeating. The Fairness Doctrine does not stimulate the free expression of diverse ideas. Rather, it promotes the "sameness" of ideas. Stations avoid the airing of controversial issues because they fear a challenge to their license renewal or expensive litigation resulting from a fairness complaint.

Fourth, governmental controls like the Fairness Doctrine are dangerous. Letting government be the final arbiter of "fairness" confers immense power. This is especially true when that same government decides on the granting of broadcast licenses.

Finally, those who favor continuing governmental regulation of the broadcasting media through the Fairness Doctrine and other controls rely on an argument that is fast becoming obsolete: the so-called "scarcity rationale." In almost every city in America—regardless of size—there are more television signals available than daily newspapers. If radio stations are counted, as they must be, general audience broadcasting stations far outnumber general circulation newspapers. Moreover, economic pressures make it nearly impossible to establish a daily newspaper in a community where one already exists.

Freedom of the press is for the benefit of all Americans. If television and radio, the most popular disseminators of news and opinion, continue to be tied down by governmental controls like the Fairness Doctrine, the people of our nation will continue to be the losers. We need to change this situation by giving fuller meaning to our First Amendment's guarantee of freedom of the press. Repeal, not codification, of the Fairness Doctrine will help lead the way.

STATEMENT OF THE ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH

My name is Michael E. Schultz, Chairman of the National Civil Rights Committee of the Anti-Defamation League of B'nai B'rith, and I welcome this opportunity to submit a statement in support of S. 742, the Fairness Broadcasting Act of 1987. The enactment of this legislation would codify the fairness doctrine and underscore the importance Congress attaches to fairness in the electronic media.

Everyone participating in the current debate over the fairness doctrine would undoubtedly agree with one basic principle: free trade in ideas is essential to a system of self-government and representative democracy. The real issue presently on the table is whether the fairness doctrine enhances free trade in ideas--whether it lives up to its name by promoting fairness. We believe it does.

Throughout its history, the Anti-Defamation League of B'nai B'rith has been devoted to combatting anti-Semitism and all forms of prejudice. Since our founding almost 75 years ago, our mandate has been "to secure justice and fair treatment for all, and to put an end forever to unjust and unfair discrimination against and ridicule of any sect or body of citizens." In working to fulfill this mandate, ADL had found the fairness doctrine to be a useful and important tool, a way to counter and to deter personal attacks and to ensure that both sides of controversial issues of public importance are presented.

Critics of the fairness doctrine frequently contend that it inhibits free speech, and that leaving broadcasters to their own devices on the open marketplace would be more likely to ensure uninhibited, robust and wide-open public debate. This reasoning is misguided, on several counts. First and foremost, the marketplace theory overestimates the ability of the public to foster balanced issue-oriented programming and underestimates the influence of major advertisers and corporations with an eye on ratings and market shares to determine what we see and hear. The broadcasting industry is highly competitive, and regardless of whether there are few stations or many, broadcasters will still prefer commercially lucrative programming. Consequently, the fairness doctrine's relevance is not affected by an increase in the number of stations in a given community.

Critics of the fairness doctrine have also generally opposed the "public trustee" approach to the electronic media, which dates back to the Federal Communications Act of 1934. Although this public trustee approach has not placed public interest and commercial programming on an equal footing, it has required broadcasters to accept a measure of responsibility for educating and informing the American public. Rather than airing only commercially popular shows or using their stations exclusively to promote their own agendas, broadcasters have in fact represented differing viewpoints on controversial issues of public importance. By and large, the public trustee approach has worked.

As an element of the public trustee approach, the fairness doctrine has also worked, often in subtle ways. Boradcasters, aware of the doctrine's strictures, have preferred to meet their fairness obligations and thereby avoid formal complaints. In other words, statistics documenting the number of official complaints filed with the FCC and their outcome do not tell the whole story. ADL itself, on numerous occasions, has relied on the fairness doctrine in informal communications with broadcasters and discovered that formal complaints are not necessary to foster more balanced presentations.

In our view, eliminating the fairness doctrine would be the precursor of a marketplace approach which would reduce licensees' accountability to the public and to the FCC. Since information over television and radio is the only news which reaches a substantial segment of the American public, a marketplace approach would risk either leaving the public uninformed on many issues or, perhaps even worse, exposed only to one side of key issues. Broadcasters could no longer be challenged for biased or distorted presentations.

Those who suggest that the fairness doctrine dictates program content and interferes with broadcasters' free speech rights misrepresents the manner in which the doctrine operates. At present, program content is within the complete discretion of FCC licensees. The fairness doctrine merely ensures that once a particular view has been voiced on a controversial issue of public importance, contrasting viewpoints will aso be aired. In so doing, it provides the public with a greater range of views, while leaving the manner of coverage, the spokesperson and the time up to the broadcaster. Therefore, it is simply not accurate to say that the fairness doctrine violates broadcasters' free speech rights.

Of all the components of the fairness doctrine, ADL attaches particular significance to the personal attack rule. This rule is triggered when an attack is made on the honesty, character, integrity or personal characteristics of a person or a group

during the presentation of views on a controversial issue of public importance. ADL and individuals associated with ADL have been victims of such personal attacks, and we are well aware that such attacks can affect the victim's credibility, thereby coloring the public's perception of his or her viewpoint. Allowing the victim to respond on the same station is vital in enabling the public to make an informal judgment as to both character and credibility. The need for a personal attack rule is not diminished by a multiplicity of stations. Without such a rule, a response on the same station would not be required, and a response on another station would be both unlikely and inadequate, because it would reach a different listening audience. The personal attack rule, therefore, should not be dismissed as a vehicle for airing private disputes; it serves a much greater purpose.

As the body considers the future of the fairness doctrine, we would like to reassert the position we have previously advanced before both Congress and the FCC: as an agency with a long tradition of defending the First Amendment's free speech guarantee, ADL believes some federal regulation of broadcast media is a necessary means of respecting that guarantee. Twenty-eight years ago, the Supreme Court observed that "there is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all." That principle is as true today as it was in 1969.

We respectfully request that this statement be included in the printed record of the hearings.

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